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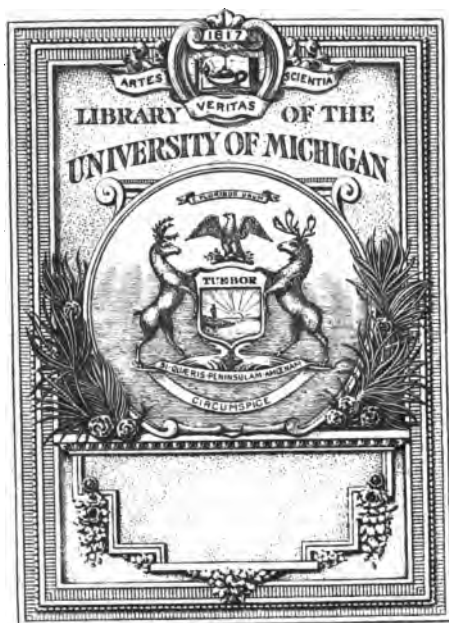
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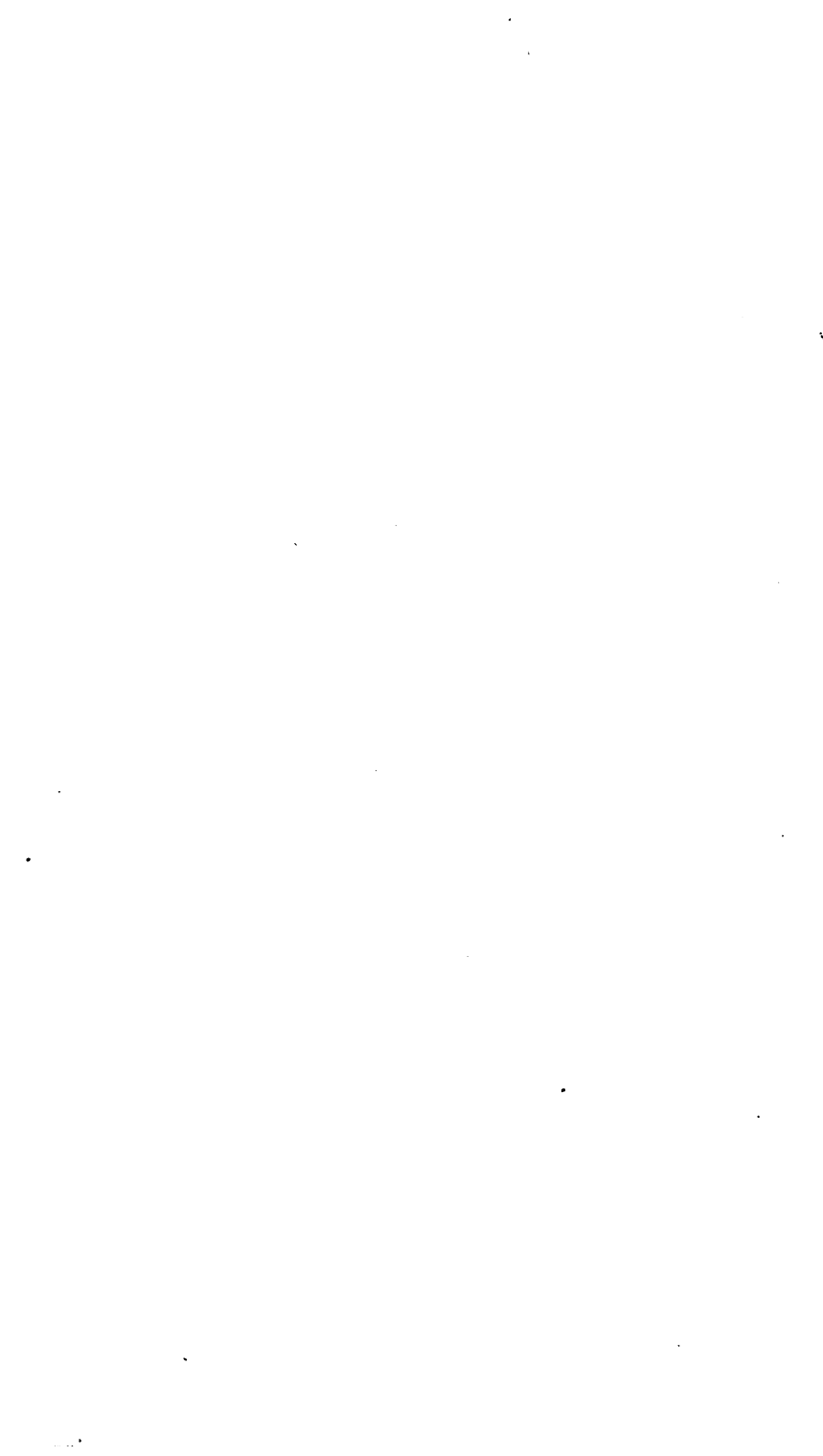
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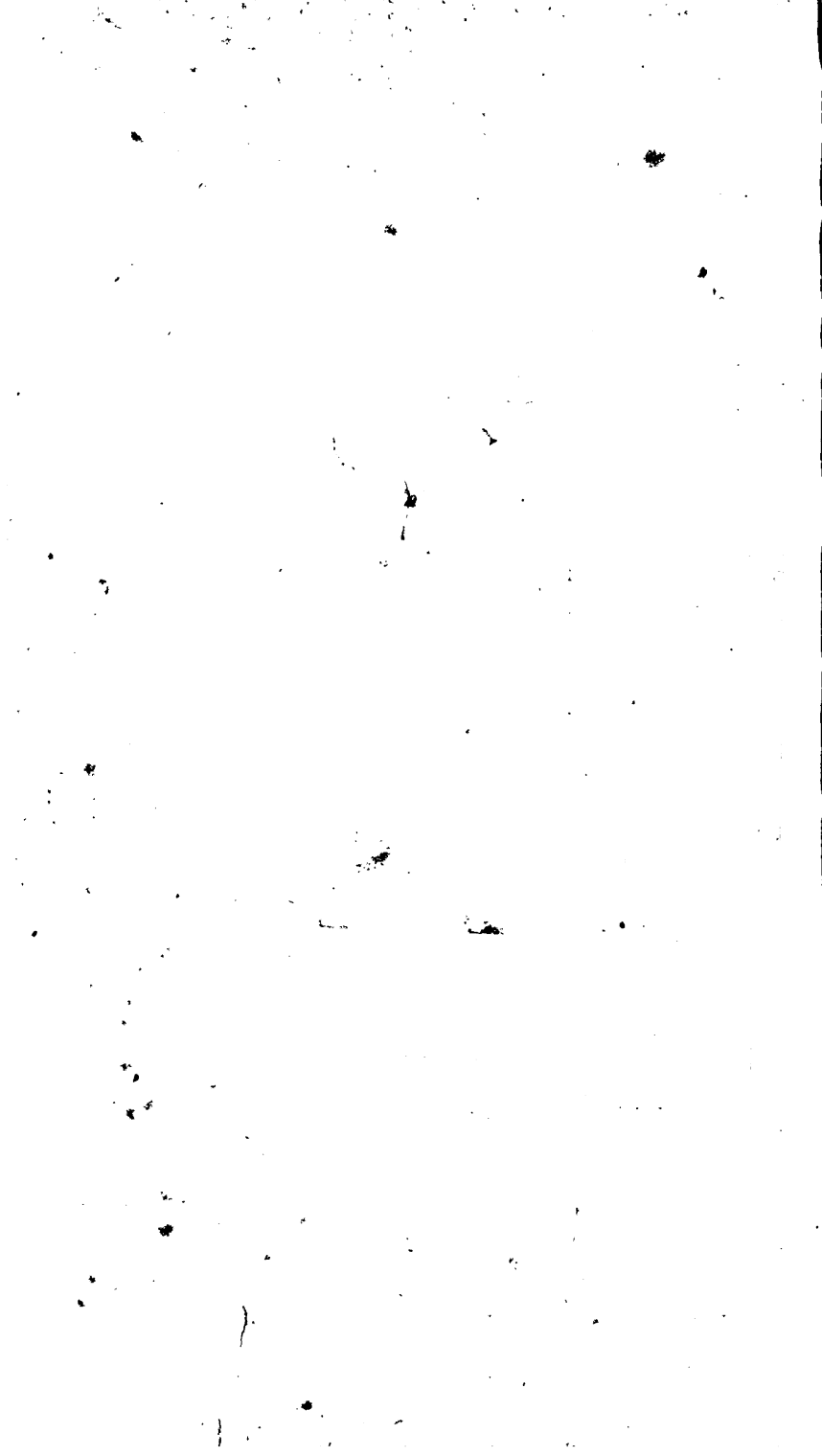




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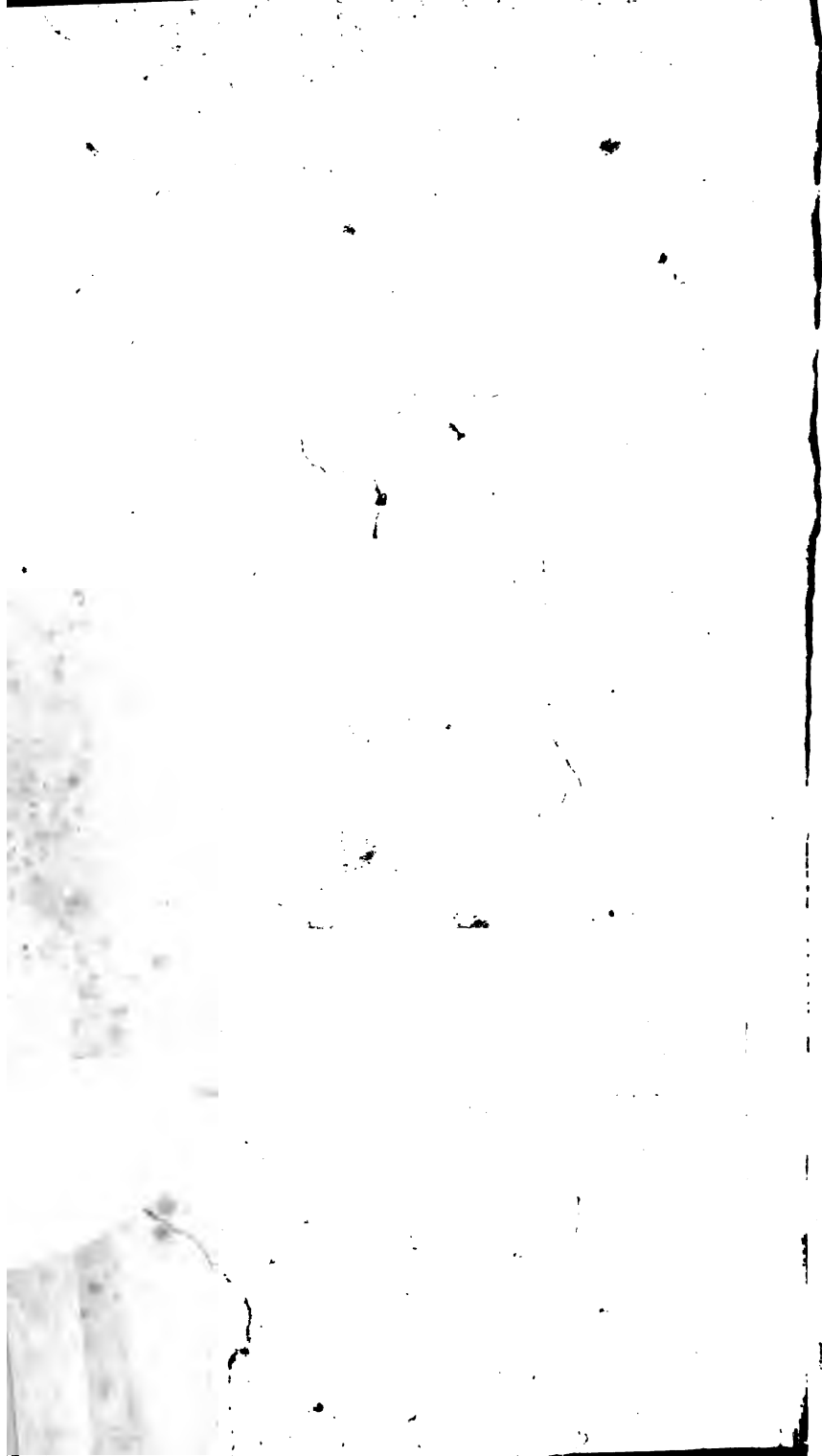
WITH A
VIEW to some late PROCEEDINGS,
AND THE
DEFENCE of Them by the MAJORITY.

The SECOND EDITION,
MUCH IMPROVED.

*The Child may rue, that is unborn,
The Hunting of that Day.* CHEVY CHASE.

L O N D O N;

Printed for J. ALMON, opposite Burlington House in
Piccadilly. 1764.



Father of Candor, friend.

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A

LETTER, &c.

S I R,

OME weeks after my son's sending you *A Letter to the Public Advertiser*, I was surprized with the sight of a * pamphlet, wherein a contrary doctrine is conveyed, altho' I cannot say directly affirmed; from which last circumstance I guess it to be the work of some enterprizing Attorney, retouched by his Superior. Be this as it may, I think it not improper to consider what has been advanced by this extraordinary writer, altho' I shall go more at large than he has done into the subject, and even differ in some things from my son himself, whose notions in several respects are too modern for my approbation.

The Attorney begins by reproaching others with "wretched quibbling upon words, misrepresentation, ignorance, blundering and falsehoods," and then represents himself and his friends as "reasoning men, of knowledge, integrity and ability;" but I suspect nevertheless, from the sophistry one now and then meets with in his argumentation, that he has had the assistance of another man "who has been taught to think himself a Statesman, and who would be too happy to be able to think himself a minister," and to whom I shall only say, as he loves a classic,

*Vane Ligur, frustraque animis elate superbis,
Nequicquam patrias tentasti lubricus artes.*

I shall not dispute the knowledge or ability either of the one as a dexterous Common-lawyer, or of the other as a

* The Majority defended.

B

versa-

versatile Logician ; and as to public integrity, they need so little be questioned, that it would be now-a-days the idlest of pastimes in any man to urge a syllable upon that head concerning either ; altho' I remember that one of them, during the last rebellion, would never in his public speeches venture to call the rebel army any other than the *Highland Army*, for fear, I presume, of spoiling his fortune, in case it succeeded. The Attorney, however, has ventured to assert in print, what I do not remember to have heard any one gentleman avow in parliament, and for that reason, among others, he has attracted my notice and indignation.

Upon this occasion, I shall not treat the subject in the perfunctory manner he has done, nor intirely pursue his method, and therefore shall only advert to what he has said as he happens to fall in my way. Indeed, the discourse of late has run so much upon libels, warrants, and resolutions of parliament, that every body's thoughts have been turned to these points. I shall endeavour to offer what I have to say with clearness, and according to law, and to express myself with that freedom and plainness which becomes the member of a free state. I do not think myself at liberty to scan the private actions of any man, but have a right to consider the conduct of every man in public ; and to approve or to condemn his doings as they appear to me to be calculated, either for the good or the hurt of his country.

The King can do no wrong ; as doing nothing of himself, but every thing by the advice of his council and ministers. The speeches from the throne ; treaties of peace and war ; the application of public revenue ; appointments to offices in the state ; the direction of crown-prosecutions ; and, in a word, every other act of government must be always debated, questioned, and blamed as the acts of the minister. As nothing can be done but what somebody is to be accountable for it, so every minister in his department is to be responsible accordingly, and to act at his peril.

There is no inseparable connection between a minister and the Sovereign. The latter is not by the duty of his office, to support any one man against the general sentiments of his people ; and of course whatever is said or written against the administration, is not to be regarded as an attack upon his throne. Indeed, were it otherwise, no

act of a minister could ever be arraigned, and no liberty of the press exist; for, every inquiry, clamour and censure made to the world, in print, would be sowing sedition, if not high treason, in the state.

By the old constitution, and afterwards by Magna Charta, no man could be put upon his trial for any offence, until a grand Jury had found a bill of indictment, or of their own knowledge, made a presentment thereof; and then the person so charged, was to be tried by a petit Jury of his Peers. By degrees however, and by virtue of particular statutes, crimes against the peace became presentable by conservators or justices of the peace. In process of time, some few offences under special acts of parliament came to be prosecuted by information; and, in some very enormous cases, the court of *King's Bench*, upon motion in open court supported by affidavit, and opportunity given to the party charged to defend himself, would sometimes grant leave for filing an information. A Jury was afterwards to try the truth of every such charge. But, Henry the 7th, one of the worst Princes this nation ever knew, procured an act of parliament which, after reciting many defects and abuses in trials by Jury, and pretending a remedy for the same, gives a summary jurisdiction to certain great officers of state, taking to their aid a bishop, to summon, try and punish, of their own mere discretion and authority, any persons who shall be accused of the offences therein very generally named and described. In short, the court of Star-chamber is, by this act, so enlarged in its jurisdiction, that it may be said to be erected, and both grand and petit Juries in crown matters are in great measure laid aside, as the Attorney-general now brings every thing of that sort before this court, which, by its constitution, never can make use of either. In lieu of an indictment or presentment of their peers, or informations by leave of the King's Bench, people of all degrees are put on their trial by a charge framed at the pleasure of the Attorney-general, called an information, and filed by him without even the sanction of an oath; and the Star-chamber decide thereon most conscientiously, but as most true courtiers would wish to do, without the intervention of a Jury. The faces of the subject are so ground by this proceeding, that every body at length is alarmed, and the people in struggling with the crown happening to get the

better, the patriots of the time seized an occasion, towards the latter end of the reign of Charles the First, to extort from that martyr to obstinacy, an act for the abolition of this most oppressive jurisdiction. But, by some fatality, the Attorney General's information, an offspring of the Star-chamber, was overlooked and suffered still to remain, and the use that is now made of it every body knows. It is reported, however, that my Lord Chief Justice Hale had so little opinion of the legality of this kind of informations, that he used to say, " If ever they " came in dispute, they could not stand, but must necessarily fall to the ground." Indeed, there is this very dreadful circumstance attending this mode of prosecution, that as the Attorney General can file an information for what he pleases, and the Crown never pays any costs, so it is in the power of this Officer to harass the peace of any man in the realm, and put him to a grievous expence, without ever trying the matter at all. Indeed, the costs of the Crown-office are so enormous, that an Attorney General can easily undo any man of middling circumstances, by only giving him two or three plunges there. Most Booksellers and Printers know this very well, and hence so few of them can, be got to publish a stricture upon any administration.

This very game was played with a late Vice-Chancellor of Oxford, when L. H. was of the Cabinet, and at the head of the law. The Attorney General filed an information *ex officio*, and, after putting the Doctor to a vast expence, entered a *nolle prosequi*. Soon after he filed another information for the same offence, and, when a like expence was incurred, entered another *nolle prosequi*. In short, this politico legal game was had resort to, because there was no evidence to convict, and was dropped and renewed in order to oppress, to the extreme charge of the worthless Doctor, and to the infinite discredit of a moderate King. During the reign of this Law-Lord, the same Star-chamber weapon was frequently brandished, like *Melusa's* head, to terrify and benum individuals. A secret and efficacious method of preserving the peace ! Many an useful publication has been nipped in the bud by an information *ex officio* (that great suppressor of truth) and by the gripe of its executioner, that enemy to light, the messenger of the press.

The

The oppression, however, can go no farther, unless, indeed, sureties for the peace be demanded, and that can only be in actual breaches of the peace, threatening the death or bodily hurt of somebody : for, if the trial proceeds, that security of Englishmens rights, a Jury must be called in. Some late statutes, however, (I should just observe) in particular instances have given a summary and final jurisdiction to Justices of the Peace, in matters of Excise, Game, &c. where the proceedings and decisions are arbitrary, vexatious and partial enough I believe ; but this does not reach to such a length as to endanger, perhaps, the Constitution itself.

There is no offence which is oftener prosecuted by an information, *ex officio*, than a libel. Now, many Judges before the Revolution, and perchance some since, have said that, in law, a paper may be a libel, whether the charges in it be true or false, against a good or a bad man, the living or the dead ; nay, that the truth of it is even an aggravation of the crime : that every libel is, by construction of law, against the peace, and (in very late times) that it is even an actual breach of the peace ; and (at last) that securities for the good behaviour may be demanded of any man, charged with being the Author, Printer or Publisher. After all, I do not yet learn by what certain signs one can know whether any particular pamphlet or paper will induce any body to commit a breach of the peace.

I think one may say of the Lawyers, who have thus matured the doctrine of informations, that they have been very astute in the forging of chains for mankind. Nothing, indeed, can be added but the revival of a position, to be met with likewise in some few cases before the Revolution, that a Jury is only to try the fact of publication, and must leave the intention of the words, to the Court, for their construction ; unless, indeed, it could be contrived to get rid of Juries intirely, that is, to establish in perfection the Star-Chamber anew. Already, almost any thing that a man writes may, by the help of that useful and ingenious key to construction, an inuendo, be explained to scandalize Government, and of course be a libel ; and could the last mentioned impediments be totally removed, instead of being only now and then got the better

ter of by the dexterity of a Judge, no writing whatever could possibly escape conviction.

Informations, *ex officio*, it was long thought, could only be filed where the King was immediately concerned, and so the old books say ; but, it is now certain that they are not limited by any thing besides the discretion of the Attorney-General, who is an Officer of the Crown, *durante bene placito*, and not upon oath. They may, in time, become an ordinary engine of Administration, as much as any Gazette or common Courier. Indeed, the secrecy ease and certainty of laying a man under a heavy prosecution in the Crown-Office, without any controul, by this mode of information, are what render it much more formidable than the common, regular, old information, which can only be filed by leave of the King's Bench, after a public hearing in open Court. It is a power that is, in my apprehension, very alarming ; and a thinking man cannot refrain from surprize, that a free people should suffer so odious a prerogative to exist. It has been, and may most certainly be again, the means of great persecution. In truth, it seems to be a power necessary for no good purpose, and capable of being put to a very bad one. For, although a man may doubt whether a Grand Jury, in times of violent party, would always find a bill of indictment or present, yet there can be none but that a Court of *King's-Bench* would grant an information, wherever it could, by any Administration, be applied for with the least foundation. It is still more wonderful that, since this prerogative is endured, there has been no act passed to subject the Attorney-General, provided he did not pursue his information, or upon trial was non-suited, or had a verdict against him, to the payment of full costs to the party abused.

However, the exercise of such a grievous prerogative lays a strong foundation for a Jury's retaining the privilege of determining both the law and the fact, with respect to libels. Indeed, it is only in conformity with common parlance, that I speak of law and fact in libel as distinct things, for to myself they appear to be inseparably united. A criminal prosecution and trial can only be had for a crime ; now, the mere simple publication of any thing not libellous (there being no public licenser) is no crime at all ; it is then the publication of what is false, scandalous and
sedi-

sedition, that is the crime, and solely gives jurisdiction to the criminal Court; and That therefore is what must, of necessity, be submitted to the Jury for their opinion and determination. A decisive argument to the same purpose may be drawn from the conduct of the Lawyers themselves in this very matter. For, it is agreed, on all hands, to be necessary for the Crown-Pleaser to set forth specially some passages of the paper, and to charge it to be a false or malicious libel. Now, this would never be done by the Law-Pleasers, submitted to by the Attorney-General, or endured by the Judges, if it was not essential to the legality of the proceeding. The King's Bench, in granting the information, only act like a Grand Jury in finding a bill of indictment, and in effect say no more than this, That, so far as appears to them, the paper charged seems to be a libel, and therefore the person accused should be put upon his trial before a Jury, whose business it will be to enter thoroughly into the matter, hear the evidence examined, and what the Council can say on both sides, and form a judgment upon the whole, which, after such a discussion, it will not be difficult for any men of common understanding to do. Whether the contents of the paper be true, or false, or malicious, is a fact to be collected from circumstances, as much as whether a trespass be wilful or not, or the killing of a man with malice forethought. Were I therefore a Juror, I should take nothing implicitly or upon trust, in this respect, from any man, but should endeavour to form my own judgment of the matter as an impartial Juror, and not as a Statesman; plain truth and fact, and common sense, and not political convenience, far-fetched inference, or ingenious inuendo, being the proper object and intent of my oath by the law of the land. "The verdict itself is not an act ministerial, but judicial, and where the Jurors give it according to the best of their judgment, they are not finable. They can only be punished by attain, that is, by another Jury, where it shall be found that wilfully they gave a verdict false and corrupt. Indeed, were this not so, they would be but mere echos to sound back the pleasure of the Court."

The strict law I know, is pretended to be, that the truth of the matter asserted is no defence against the charge of its being a libel; but that is a point which I shall never be

“ or sold such a book, or the like: for, if they should ignor-
 “ rantly take this for an answer, and bring in the prisoner
 “ Guilty, tho’ they mean of the *naked* fact only, yet
 “ the Clerk recording it demands a further confirmation
 “ thus, *Then you say D. is guilty of the trespass or misde-*
 “ *meanor in manner and form as he stands indicted; and so*
 “ *you say all?* And the verdict is drawn up, *The Jurors*
 “ *do say, upon their oaths, that D. maliciously, in contempt*
 “ *of the King and the Government, with an intent to scan-*
 “ *dalize the Administration of Justice, and to bring the same*
 “ *into contempt, or to raise sedition, &c. (as the words*
 “ *were laid) spake such words, published such a book, or did*
 “ *such an act, against the Peace of our Lord the King, his*
 “ *crown and dignity,*”

Besides, there is a constitutional reason, of infinite mo-
 ment to a free people, Why a Jury should of themselves
 always determine whether any thing be or be not a libel.
 It is this, that ninety-nine times out of an hundred, these
 informations for public libels are a dispute between the
 ministers and the people; and, in my conscience, this
 very circumstance has made our Progenitors retain to
 themselves the power of determining both the law and the
 fact, with respect to libels, altho’ they waved or ceded to
 the Judges the power of determining the law in all other
 respects. Having acquiesced in the power exercised by the
 Attorney General, of informing against what he pleases as
 a libel, they were resolved not to part with the prerogative
 of judging finally upon the matter themselves; and, in
 my poor opinion, had they done so, we should, long be-
 fore this, not only have lost the liberty of the press, but
 every other liberty besides. No man that disapproved the
 measures of a court, would venture to discuss the propriety
 or consequence of them. No man would venture to utter
 a syllable in print against any power of office, and much
 less against any royal prerogative, however illegally usurped.
 He would be sure to be charged with a libel by the At-
 torney General, and to be fined, and perhaps imprisoned
 without mercy, by the *King’s Bench*, as, in fact, hap-
 pened to Sir Samuel Bernardiston, whose judgment was
 reversed by Parliament after the Revolution.

Before that glorious era, the Judges held their places at
 the King’s pleasure, and acted accordingly. Their oath
 was then their only restraint; that was some guard, but
 not

not a sufficient one, when the consequence of a non-compliance with Administration would deprive a Judge of his livelihood, and raise the indignation and resentment of the Crown. Judges are now for life, and a noble security it is ; and yet, unless one could insure them from the common failings of mankind, from ambition, the desire of promoting their children, or, if they have no children, of providing for their nephews, one may easily conceive that some influence may still take place even in a Judge.

But it is become more necessary than ever, that the people should retain the privilege of determining the law and the fact, relative to libels, because their representatives have lately, by a resolution, declared, that *privilege of parliament does not extend to the case of a libel*. I had been always in an error upon this head before, which I was led into by old cases. My notion was not taken up in consequence of the construction made by the present Court of Common Pleas, nor did I, indeed, entirely build upon my own sense of the matter ; but I was fixed in the opinion by the authority of that great lawyer Lord Chancellor Egerton, who, after having held the great seal for fourteen years, with greater reputation than any man before him, in a solemn argument which he delivered in the case of *the Post-Nati*, and which he afterwards published himself, upon a strict review, and with great deliberation, (so that it is uncontrovertibly his opinion) has laid down the same doctrine, and cites particularly the old determination made by the Judges in the case of Thorpe. His Lordship there says, “ Then let us see what the wisdom of parliaments
 “ in times past, attributed to the Judges opinions declared in parliament, of which there may be many examples. In the parliament anno 31 H. 6, in the vacation
 “ (the parliament being continued by prorogation) *Thomas Thorpe*, the Speaker, was condemned in a thousand
 “ pounds damages, in an action of trespass brought against him by the Duke of York, and was committed to prison
 “ in execution for the same. After, when the parliament was re-assembled, the Commons made suit to the King
 “ and the Lords, to have *Thorpe*, the Speaker, delivered, for the good exploit of the parliament ; whereupon the
 “ Duke of York’s counsel declared the whole case at large. The Lords demanded the opinion of the Judges,
 “ whether, in that case, *Thorpe* ought to be delivered
 “ out

“ out of prison by privilege of parliament : the Judges
 “ made this answer, That they ought not to determine
 “ the privilege of that High Court of Parliament ; but,
 “ for the declaration of proceeding in lower Courts, in
 “ cases where writs of superseas for the privilege of the
 “ parliament be brought unto them, they answered,
 “ That if any person that is a Member of Parliament be
 “ arrested, in such cases as be not for treason or felony, or
 “ for *surety of peace*, or condemnation had before the
 “ parliament, it is used that such persons be released, and
 “ may make Attorney, so as they may have their freedom
 “ and liberty freely to attend the parliament.”

The Lords, in the following reign, most solemnly ratified this doctrine, in the famous case of the Earl of *Arundel*, by a resolution *nemine contradicente* ; and then presented to the King, the following remonstrance “ May
 “ it please your Majesty, we the Peers of this your realm
 “ now assembled in parliament, finding the Earl of
 “ *Arundel* absent from his place, that sometimes in this
 “ parliament sat amongst us, his presence was therefore
 “ called for ; but, hereupon a message was delivered unto
 “ us from your Majesty by the Lord Keeper, that the Earl
 “ of *Arundel* was restrained for a *misdemeanor*, which was
 “ personal to your Majesty and had no relation to matter
 “ of parliament : this message occasioned us to enquire
 “ into the acts of our ancestors, and what in like cases
 “ they had done, that so we might not err in any dutiful
 “ respect to your Majesty, and yet preserve our right
 “ and privilege of parliament : and after diligent search
 “ both of all stories, statutes and records that might inform
 “ us in this case, we find it to be an undoubted
 “ right and constant privilege, That no Lord of Parliament,
 “ sitting in the parliament, or within the usual times
 “ of privilege of parliament, is to be imprisoned or restrained
 “ (without sentence or order of the house) unless
 “ it be for treason or felony, or for *refusing to give security
 “ for the peace* ; and to satisfy ourselves the better,
 “ we have heard all that could be alleged by your Majesty’s
 “ learned Council at Law, that might any way infringe or
 “ weaken this claim of the Peers and to all that claim be shewed
 “ and alleged, so full satisfaction has been given as that all
 “ the Peers in parliament, upon the question made of this
 “ privilege, have *una voce* consented
 “ that

“ that this is the undoubted right of the Peers and inviolably has been enjoyed by them.”

Now what my reasoning from such premises must be, may be easily guessed. It was thus : Members are clearly intitled to Privilege in all misdemeanors, for which sureties of the peace cannot be demanded. But, sureties of the peace cannot be demanded but in actual breaches of the peace. The writing of any thing quietly in one's study, and publishing it by the press, can certainly be no actual breach of the peace. Therefore, a Member who is only charged with this, cannot thereby forfeit his Privilege.

I thought that no common man would allow any writing or publishing, especially where extremely clandestine, to be any breach of the peace at all ; and that none but lawyers, on account of the evil tendency sometimes of such writings, had first got them, by *construction* to be deemed so. I had no idea that it was possible for any lawyer, however subtle and metaphysical, to proceed so far as to decide mere authorship, and publication by the press, to be an *actual* breach of the peace, as This last seemed to express, *ex vi termini*, some positive bodily injury, or some immediate dread thereof at least ; and that, whatever a challenge, in writing, to any particular might be, a general libel upon public measures, could never be construed to be so. And I knew it was not required of any one in matters of law, to come up to the faith of an orthodox divine, who, in incredible points is ready to say, *Credo quia impossibile est*.

Indeed, I had originally conceived, upon a much larger scale of reasoning, that freedom from arrest for libel was a privilege incident and necessary to a House of Commons, because it was a safe-guard against the power of the Crown, in a matter that was almost always a dispute between the minister and the subject, and no more than a natural security of person for an independent part of the legislature, against the arbitrary proceeding of a King's officer, in the least ascertained of all imputable offences. But this point has been lately cleared up to the contrary in St. Stephen's chapel, upon a debate of two successive days, the last of which continued from three in the afternoon till two in the morning*. Nevertheless, the Commons of England

* Vide the printed Votes of Wednesday the 23d of November 1763, and Thursday the 24th of November, 1763.

at large, having come to no new compact or surrender of ancient privileges, still possess their old right of being judges of the law in libel.

I cannot help adding too, with regard to pledges for good behaviour, that, in my apprehension, they are not demandable by law in the case of a libel, before conviction; for this misdemeanor is only made a breach of the peace, at all by political construction, nothing being an actual breach of the peace, but an assault or battery, the doing or attempting to do some bodily hurt. Now, surety for the peace is calculated as a guard from personal injury; and articles of the peace can only be demanded from a man, who by some positive fact has already broke the peace, and therefore is likely to do so again; or where any one will make positive oath, that he apprehends bodily hurt, or that he goes in danger of his life. The *articles* which are every day exhibited in the court of King's Bench, are always for the prevention of corporal damage. No case is so common as that of women exhibiting articles of the peace against their husbands; now, I do not believe, that if any wife was to allege as a foundation for such articles, her husband's having wrote a libel against her; let the libel be ever so false, scandalous and malicious; that Lord Mansfield would make the husband find sureties for the peace, or for his future good behaviour on that account. Another reason which strongly weighs with me is, that the writers upon bail, or the delivery of a man's person from prison, never mention sureties for the behaviour, in any case of a libel or constructive breach of the peace; and yet it would have been material for them so to have done, if such security must be given before a man could obtain his liberty. My Lord Coke has wrote an express treatise upon bail and mainprise, and considered the writs *de homine replegiando*, *de odio & atia*, and *Habeas Corpus*, and yet it is plain he had no imagination of the thing. He says, " Bail and mainprize is, when
 " a man, detained in prison for any offence for which he
 " isailable or mainprizable by law, is by a complete
 " Judge or Judges of that offence, upon sufficient sure-
 " ties, bound for his appearance and yielding of his body,
 " delivered out of prison. As for example, if a man be
 " indicted of any felonies, publishing of any seditious
 " books, &c. contrary to the form of an act made in
 the

“ the 23d year of Queen Elizabeth, he may be bailed, for the offence is made felony, and bail and mainprize not prohibited.” Now, in the case of a public libel, there is nobody who can come into the court of *King's Bench* and exhibit articles of the peace against the writer or publisher, swearing that he believes himself to be in danger of bodily hurt from him, and that he walks in fear of his life.

Besides, for words scandalous in themselves or attended with consequential damages, or for a libel, the party traduced may bring an action of trespass on the case, which action however, lies only for a wrong without force against the peace. Now, this must mean and can only be a *constructive* breach of the peace. For, if it were an *actual* breach of the peace, an action of trespass *vi et armis* (as the lawyers call it) would lie, as it does for an assault and battery and false imprisonment; but, I believe, no lawyer ever heard of such an action being brought either for words, or for a libel, or would say that in either case it would lie. This therefore is a proof that the Law does not regard a mere libel as an *actual* breach of the peace.

It is further observable, that there is no adjudged case where this demand of surety for the peace in libel, has been determined to be legal; the crown hath in some cases, after insisting upon it, avoided having the point determined, and relinquished the claim to it; it is contrary to the general principles and notions of law; and it may be the means of great oppression. Any gentleman would therefore serve his country, by resisting such a lawless demand, and by having it solemnly argued, upon the first occasion.

When a man is charged with a libel, by an arbitrary information *ex officio*, he must cry out, like a Roman of old, *Provoco ad Populum*; I appeal to my country, that is, to a Jury of my equals. I will give bail for my appearance to try the validity of this charge before them, but I will do nothing more. I never heard till very lately, that Attorney Generals, upon the caption of a man supposed a libeller, could insist upon his giving securities for his good behaviour. It is a doctrine, injurious to the freedom of every subject, derogatory from the old constitution, and a violent attack, if not an absolute breach, of the liberty of the press. It is not law, and I will not submit to it.

What

What makes me insist the more upon all these points is, an assurance that the legal methods of proceeding in every case of a libel, are sufficiently severe, and that therefore all illegality is totally inexcusable. The prosecution is heavy, and if the supposed offender be found guilty by the Jury, his punishment may be extremely grievous. After the trial, all the circumstances that appeared are reported, by the Judge who presided, to the *King's Bench*; and this Court gives judgment thereupon, after deliberation, and both can and will proportion the punishment to the case. They may, *after conviction*, pillory, fine, imprison, and even insist upon sureties for the good behaviour, according to the nature and degree, the mischievousness and tendency of the libel. In bad times, Sir Samuel Bernardiston, for letters not very extraordinary, was fined 10,000*l*. In good times, Shebbeare, for the most seditious and treasonable libel that could be penned, was fined in no very great sum on account of his circumstances, but was pilloried, committed to prison for two years, and obliged to find security for his behaviour, in a pretty tolerable sum himself and two sureties in as much more; for seven years to come. All this may be done in the regular way of proceeding, and seems to be as much power of punishment as can be wanted, for a mere misdemeanor; because I presume nobody chuses to revert to the additional punishments inflicted before the star-chamber was suppressed; such as public whippings, burning in the face, slitting the tongue and nostrils, cutting off the nose and ears, and long or perpetual imprisonment, which was the treatment of writers against Administrations in those days, and was absolutely inflicted at one time upon the three liberal professions, in the persons of a clergyman, a counsellor, and a physician.

If the libel be upon the Legislature, and the Libeller a Member, the House will expel him, as Queen Anne's Tories did Sir Richard Steele, for charging the Queen, and her Ministry, with a design of breaking the establishment and introducing the Pretender; and yet I suppose now-a-days there is nobody who doubts in the least that Knight's having published the truth when he said so. Indeed, he admitted himself the Author of the paper complained of, so that the then Commons were not obliged to help that necessary fact out, by the reception of testimony
not

not upon oath. - Nay, the Courtiers of that day thought the punishment of expulsion alone so severe (although Sir Richard's creditors were not more numerous than Mr. Wilkes's) that they stopped there, and carried on no prosecution against him in Westminster Hall or *any where* else.

I do not touch again upon Mr. Wilkes in this place as commiserating him particularly, having ever avoided his acquaintance, but merely to say, what indeed the History of England from the beginning of the reign of Charles the First to the present time may illustrate, that prosecutions for libels generally arise from, and are pursued with a spirit of party-revenge. Men are upon such occasions apt to do things which in cooler moments they would be ashamed of. With respect to the last named Libeller, I must however declare, had I been his constant comrade, and my doors open to him at all hours, much more the partaker of his loosest pleasures, and of his most shameful blasphemies, I should not have stood forth either in the one House or the other as the immediate mover of *the poor devil's* public disgrace, censure, prosecution and ruin, or as the mercenary advocate of his pursuers, unless I had an inclination to convince mankind that I was regardless of all principle whatever, excepting that of serving a party for my own private interest, and from that motive was willing to act upon any stage the most inconsistent and most abandoned of all parts, even against the companions of my happiest moments, and to imprint this lesson upon the world, that no motive whatever of public good or private friendship was at the bottom of my conduct, or even the smaller restraint of common decorum. Real good-nature, friendliness, charity, (whatever you call it) will cover a multitude of sins, but mere companionable ease or mirth, with an unfeeling heart, only enhances the profligacy of a character. If debauchees will not sink below the worst of gangs, they should at least be true to each other, as kindred souls. In my own opinion, this ludicrous Libeller did himself all that his severest enemies could wish, to turn his own case into ridicule, and to let the people see that a love of farce and merriment predominated in all his actions; and that he had too much levity and viciousness of natural constitution, to make the good of his country the rule of his conduct in any one action of his life. But the sight of

these very things should make grave men of all sides attend to the constitution in such contests of profligacy, to prevent the laws of their country from being made either the sport or the sacrifice of party upon the occasion. A point that is carried for the sake of punishing a worthless fellow, may be cited hereafter as a precedent for the most dangerous prosecution and oppression of an excellent patriot.

The most respectful and constitutional of remonstrances from seven bishops, in behalf of the established religion, has been treated as a seditious libel, and nothing but the honesty of a Jury saved them from the most unjust condemnation. "The Attorney and Solicitor both affirmed "to James the 2d, That the honestest paper relating to "matters of civil government might be a seditious libel, "when presented by persons who had nothing to do with "such matters, as (they said) the Bishops had not but in "time of parliament *."

Mr. Somers's *modest plea for the Church of England*, underwent the same denomination, although it was no more than a seasonable defence of our national worship, upon the true principles of the constitution, against an arbitrary and Popish Court.

And I remember myself a tiny pamphlet, published by the Author of *The Considerations on the German war*, questioning the merits of the defence of Minorca, by argument, not by hard words or foul names, which was unfortunately on motion in the *King's Bench* deemed a libel, and an information in the ordinary way granted against the writer, whereby he became a considerable sufferer; and yet I believe any man who were to read this performance now, free from prejudice, would never concur in that opinion.

In short, one cannot guess what may, or may not, in some unlucky time, be regarded as a libel by some Judge or Attorney-general. The highest or lowest of Authors, the noblest or the most sneaking, the Original or the Copy, the Patriot or the Tool, the Head of a Party or the Amanuensis of a private Junto: in short, the most respectable Commonwealthsman or the paltriest of Coffee-house

* See Lord Glarendon's State Letters, p. 317.

Listeners and Political Eavesdroppers, may equally chance to fall under this arbitrary brand.

Nay, if two foreigners here should happen to have a dispute relative to their respective characters or appointments, and a difference should arise about the economy or charges of one side and the other, and either should publish, by way of justification of his pretensions, letters that really passed, they might, for aught I know, be held a libel, for which the Attorney-general might file an information, and whereto no defence, by the help of a little management, should be deemed possible, and which counsel might fairly give up without the loss of their character.

If a man was now to publish an ode, like that of Mr. Pulteney to Lord Lovel,

“ Let’s out for England’s glory,”

inviting any courtier to join in measures of opposition to the administration, and it was to be written with half the spirit and beauty, it might be the object of an information *ex officio* as a libel, altho’ no man turned of thirty, I suppose, would think any placeman could be moved thereby to oppose the court, and quit a part of his finery, for the sake of being a patriot.

Nay, if it be law, that a man may be guilty of a libel by writing against the dead (as well as the living) I do not see how the world is ever to discuss the actions of administration, or any man to publish animadversions upon their conduct in particular instances; nor what is to become of the licensed historian, with his rule of *Nequid veri dicere non audeat*. For example, if I was to say of a late Great Chancellor, that I could not think he merited the appellation of a patriot, having ever regarded him as a decent, circumspect, prerogative lawyer; that he leaned in his notions too much towards aristocracy; that he seemed, in his politics, to approach much nearer to the principles of the Earl of Clarendon than of Lord Somers; and that, at last, upon what *public* principles he joined the opposition, after having been in all things with the court for forty years before, I could never learn. It seemed, that even his opposition to, or rather disapprobation of, the peace, proceeded rather from a private dissatisfaction at the man who happened at last to have the making of it (his old friends being displaced) than from any motive of public concern, and that some of his reasons against it, were

those that most indifferent men, thought the strongest in its behalf, namely, the boundaries in North America, which the course of a great river is made to be, and must for ever most notoriously remain as long as the world lasts. Indeed, I could never determine whether he had, or had not, a good conception of our foreign interests, altho' I always imagined he had a thorough one of all the domestic connections among us. I might add, he opposed, curtailed and embarrassed the militia act in its formation, progress and execution, as much as he could, and yet, this was intended as a constitutional force, or counterpoise against a standing army; that he was apparently a principal man in, if not the sole cause of, defeating a new Habeas Corpus bill, calculated for the prevention of some evasions of the old act; and that he projected, in concert with another new-made peer, the Marriage-act, and, having disapproved a short bill drawn by the Judges, obliging people to marry in churches, that their marriages might be regularly registered and capable of proof; had the reputation of drawing another, filled with clauses calculated for the prevention of all marriages without consent, with a view, as it should seem, to perpetuate, as much as might be, a fortune or family once made, by continuing, from generation to generation, a vast power of property, and to facilitate at each descent, the lumping of one great sum, or one great family, to another, by bargain and sale, in opposition to the generous principles of equality and diffusive property, which free states have always encouraged. The royal family, however, was excepted out of his late act, altho' their marriages are alone a matter of any public concern or influence. I might ask too, whether his Lordship did not uniformly throughout life pursue his own private interest, and raise the greatest fortune and provide the most amply for his family of any lawyer that ever lived; and whether, during his dominion, the judicial promotions were disposed of upon ministerial motives or merely agreeable to professional desert. I might nevertheless, and ought to add, that the same illustrious personage was blessed with a good temper, and great worldly prudence, which are the two hand-maids in ordinary to prosperity; that his whole deportment was amiable; and, that he possessed, in general, the soundest understanding in matters of law and equity, and the best talents for

for judicature I had ever seen ; that he might be cited as an example, in this country, of the perfect picture of a good Judge, which my Lord Bacon hath so admirably drawn ; and that he was, in short, a truly wise magistrate.

He was free from the levities, vices and expences, which frequently disfigure men of a lively and fruitful fancy. His station did not require, nor his genius furnish him with imagination, wit or eloquence. And, perhaps, had he possessed a true taste for the fine arts and the politer parts of literature, he would never have been so extensive a lawyer, to which however the plainness of his education might have somewhat contributed. In short, one might say that, Lord Somers and He seem to have been the reverse of each other in every respect.

Now, this might be prosecuted as a libel on the dead ; whereas the writer penned no part of it maliciously, nor falsely as he believed, and did not mention a tenth part of what he might in support of the justness of the character. And therefore, unless a matter be thoroughly canvassed, and gentlemen at the bar will speak out to a Jury, that they may have the proper information to deliberate upon, it is hard to say what may not very glibly pass at one time or other for a libel. Every thing seems to depend upon the Jury's considering and determining both the law and fact.

I trust, therefore, this singular privilege will ever be exercised by the people themselves. If they once give it up, they will never know any thing of public transactions, but from the most partial and least credited of all mankind, from writers employed by the authors of the measures themselves, who, like Scotch Reviewers, may have the face to attempt to make Englishmen believe, that a man can be a constitutional judge who quits the laws of the land and deviates from the established practice of courts, in spite of common sense and the constant declaration of our ancestors *nolumus leges Angliæ mutari*. Let the dependent judges before the Revolution have advanced what doctrine they please, the *fact* has been, that juries have always exercised the right of determining what is a libel. It hath saved this constitution often, is the great bulwark of liberty, and should never be resigned but with the last breath.

Few

Few men know much of the nature of polity, and, of them, all do not sufficiently attend to the conduct of Administration, to observe when slight innovations are made in the laws or in their Administration; and, of those who do, very few indeed have that degree of understanding which enables them to judge soundly of the consequences of such alterations, with respect to their liberties in general. Again; of these very few, not more than one perhaps, has activity, resolution and public spirit enough to publish his thoughts (as Mr. Somers did upon several occasions) concerning what is going forward, in order to alarm (like a good citizen) the rest of his fellow subjects. Inasmuch, that breaches in the constitution, which by degrees bring on a total loss of liberty, are either wholly unnoticed, or else are regarded as the mere violences of party, by which nobody can be affected but the immediate actors. Whereas, for the sake of compassing their own ends, there is nothing which party-men will not do, *per fas aut nefas*; just as an established high churchman will persecute even to death, any other man or divine that questions his authority or his doctrine. From hence arise precedents of all sorts of illegal and unconstitutional practices. Ministers (as not one in a thousand is actuated by any principle of public good, or even by a desire of honest fame) for the sake of power, title, riches, and pre-eminence of any kind, will deceive the best inclined Prince, and minister to the humour, folly, vices and domination of the worst. On the Exclusion-bill, no more than two, even of the Bishops, would venture to vote for it, altho' their Bishopricks depended upon the continuance of the Protestant religion, which that bill was avowedly framed to preserve. Now, when an impartial man gathers this, both from his own experience and from history, how can he help being moved at the doctrine that is publicly held with respect to writings that animadvert upon public proceedings, and the use that is made of that desperate sword an information, together with the means which are every day devised to make it more dreadful?

I will venture to prophesy, that if the reigning notions concerning libels be pushed a little farther, no man will dare to open his mouth, much less to use his pen, against the worst Administration that can take place, however much it behoves the people to be apprized of the condition

tion they are likely to be in. In short, I do not see what can be the issue of such law, but an universal acquiescence to any men or any measures, that is, a downright passive obedience.

There is one great reason, why every patriot should wish this sort of writings to be encouraged ; which is, that animadversions upon the conduct of Ministers, submitted to the eye of the public in print, must in the nature of the thing be a great check upon their bad actions, and, at the same time, an incentive to their doing of what is praiseworthy. Nevertheless, if it be once clear law, That a paper may be a libel, whether true or false, written against a good or bad man, when alive or dead, who is there that may not continue a Minister, whether he has a grain of honesty or understanding, if he should happen to be a favourite at Court? The worse his actions are, the more truly and sharp the writer states them, and the more the public, from his just reasonings, detest and cry out against them, the more scandalous and seditious, of course, will be the libel ; for, *the truth of the fact is an aggravation* of the libel, and it was That which occasioned the clamour. There is but one step farther before you arrive at complete despotism, and that is to extend the same doctrine to words spoken, and This I am persuaded would in truth very soon follow. And then what a blessed condition should we all be in ! when neither the liberty of free writing or free speech, about every body's concern, about the management of public money, public law and public affairs, was permitted ; and every body was afraid to utter what every body however could not help thinking!

With respect to libels on particular persons in their private capacities, there may be some little foundation for a doctrine of this sort ; because, as the welfare of the State has nothing to do with his private transactions, you ought not to make reflections which may injure him in his calling or his reputation ; you must always do this out of personal spite, and therefore ought to be punished for such your malevolence.

But, the case is totally different with respect to an Administration ; for the country in general is always the better or the worse for its conduct, and therefore every man has a right to know, to consider, and to reflect upon it.

Their

Their posts in the State, or their public characters, are not like any individual's particular trade, profession or fortune, or his private character. The writing of them out of their places in the Government is not a loss for which they have any right to be repaired in damages. Their holding ought only to be *quam diu bene se gesserint*, and of this the people at large ought to be made judges, as every man in this country is represented, and consequently concerned in the legislature itself.

However, from a confusion of these two different kinds of libels, introduced and upheld from very bad motives, it seems to me that a general doctrine has been laid down, Now, my notion is, that in public libels the truth of the charge should be an absolute defence; whatever may be thought necessary with regard to private libels. The public is essentially interested in this discrimination being made.

When men find themselves aggrieved by the violence or the misconduct of the persons appointed to the Ministry, it is natural for them to complain, to communicate their thoughts to others, to put their neighbours on their guard, and to remonstrate in print against the public proceedings. They have a right so to do, as much as a borough has a right to reject any Court candidate, and to publish the reasons for so doing; and both of these rights will I hope be exercised until there can be both a *congrès de dire* and *d'écrire*, and a *congrès d'élire*, established in the State as there already is in the church. The liberty of exposing and opposing a bad Administration by the pen is among the necessary privileges of a free people, and is perhaps the greatest benefit that can be derived from the liberty of the press. But Ministers, who by their misdeeds provoke the people to cry out and complain, are very apt to make that very complaint the foundation of a new oppression, by prosecuting the same as a libel on the State. Now, the merit or demerit of these publications must arise from their being true or false; if they are true, they are highly commendable; if they are wilfully false, they are certainly malicious, seditious and damnable. The mere pretence of a paper being seditious, if the matter of it be fact, is to be disregarded; for, I do not see how any writer can publish to the world the justest and most important complaints, without tending thereby to render the people and their con-

constituents dissatisfied with the administration, and even clamorous against it. Nay, I scarcely can frame to myself any other way of letting his Majesty know that the ministry he has appointed is bad. However, if a minister notwithstanding should continue a favorite at court, and the people being affected with what was written should clamor, and have great reason for so doing, I make no doubt but any Attorney-General upon the slightest hint from the proper place, would file an information against the Writer, and charge him at once with endeavouring to alienate the affections of the people, and to raise *traitorous* insurrections against the peace of the King; altho' it were obvious to every indifferent person, that the unlucky writer had no such intention, nay, had been ready on a former occasion voluntarily to associate for the defence of his Majesty's title, and to venture his life in the field to support it. And yet I am fully convinced, that were it not for such writings as have been prosecuted by Attorney Generals for libels, we should never have had a Revolution, nor his present Majesty a regal Crown; nor should we now enjoy a protestant religion, or one jot of civil liberty. Kings can hardly receive any intelligence but what their ministers give them, and these gentlemen, being generally guided by avarice and ambition, endeavour to represent every man who strives to get them dismissed from their employs, as one who is about to attack the throne itself, call him traitor directly, and then exert the power of the crown to demolish him. The use of the word *treasonable* is generally, in my conscience, to give them a pretence for disregarding the common rules of Law and Justice. And if they are questioned in parliament for what they have done, they are in hopes a majority may be procured to come to a resolution in their favor, or at worst, to prevent any from being come to against them. And then, who dares say they have done amiss?

Libels are by no means a "harmless sport"; for truth alone can excuse any man in complaining even of a bad magistrate: but yet, I cannot think them such dreadful things as vindicate ministers in breaking through every law for the sake of coming at the writer. I believe most sober men, who see already what lengths such prosecutions may be carried according to law, and how deeply the liberties of the people may be affected by such means, are of opi-

nion, that if some of the legal methods of prosecution now acquiesced in were done away, the constitution would be the better for it. The prerogative which an Attorney General assumes of filing an information against whomsoever he pleases, is certainly a reproach to a free people; and if the regular information awarded upon special motion by the *King's-Bench* were likewise taken away, I do not think the constitution would be injured by it: in which case, the old common law method of indicting for a libel, as a violation of the peace, would be the means that every body must resort to; and in my own opinion a grand jury * are very competent and the properest judges whether any publication be destructive to the welfare of the state or not.

Altho' there is as yet no licensing act afoot, except for the Stage; If a man prints what is supposed libellous either on the state, or any particular person, he is liable to be prosecuted for it. But people like to see a prosecution go forward in the ordinary way, as was the case with Dr. Shebbeare: in comparison with whose writings, those of Mr. Wilkes may really be said to be "a mere exercise of wit and talents, and an innocent exertion of the liberty of the press." Mankind will ever dislike violent proceedings. Altho' the person himself may merit the chastisement he meets with, yet if this be inflicted by illegal methods, it will make every man fear, should he raise the resentment of the ministry, that himself would be treated in like manner, whether he had committed any crime in law or not. If things are done in one instance contrary to law, they may in another. No man is secure, when the laws of the land cease to be a protection. Although the messenger, or the dragoon, be not at my door, yet it is very disheartening to find that it is no longer in my power to be secure against their being there. My liberty is equally gone.

No necessities of state can ever be a reason for quitting the road of law in the pursuit of a libeller. The attack of this class of writers seldom goes farther than the minister, for the sake of bringing in some other man; and so far from being "of all other the instance the most dangerous

* See a valuable treatise upon Grand Juries called *The Security of Englishmen's Lives*, attributed to Mr. Somers, who not only understood the constitution but loved it.

gerous to the public quiet" is certainly not at all so, if by the public quiet be meant the establishment itself.

But, if any writing should be a libel, and be prosecuted only as such, it is in vain afterwards to call it "abominable or treasonable," with any idea that such epithets will warrant an extraordinary proceeding in the prosecutor. This end indeed it may answer, and a very diabolical one it is; it may serve to found a pretence for demanding excessive bail, which if the supposed libeller cannot find, he must lie in prison: however, as there have several acts of parliament passed from time to time forbidding excessive bail, particularly the Habeas Corpus act, and as the House of Commons have even since in the case of Lord Chief Justice Scroggs expressed their detestation of such oppression, a Judge is not now so likely to put this mode of tyranny in use. But, if the doctrine of security for the peace can be established, I do not see what should hinder a time-serving magistrate, from insisting upon ever so enormous a pledge *enormine*: The Judge might say, I have taken moderate bail; but, I found he was a man of parts, much disinclined to his Majesty's measures of administration, and had reason to think he would still write against them, which could not fail of raising a dangerous sedition, and therefore I thought the best way was to take such a pledge for his good behaviour for seven years, as would deter him from writing any thing that could possibly be deemed a libel; for if he did, he would forfeit his caution-money, and That would be so great a loss, it would absolutely ruin him. I did for the best; and, I do not know that there is any statute which prescribes any measure for security of the peace. Now, supposing a chief Justice was to be complained of for such an oppression, as a gross fraud on the spirit and intention of the Habeas Corpus act, and the House of Commons were to inquire into the matter; if the administration which he served was then prevalent, it might perhaps be very difficult to obtain any censure of the practice; but, if that could be done, it is highly improbable they would go any farther; and, at the worst, his Lordship would get off without any fine upon himself, as well as Chief Justice Scroggs did. To say the truth, and to speak out upon so material a subject, I cannot help imagining that this word *treasonable* or *traitorous* is frequently thrown into the charge against a supposed libeller

by an Attorney General; for the purpose of affording colour for the demand of high bail, and if possible, enormous security for the good behaviour.

Had this practice of surety for the peace upon the charge of a libel prevailed in Charles the II^d's time, it is inconceivable that the legislature should not have mentioned it by name in the Habeas Corpus act. The patriots who procured that statute evidently meant to have a delivery of the body in all cases not capital by bail; and must certainly think by the words *speedy relief of all persons imprisoned for criminal or supposed criminal matters*, that they had provided for all cases of misdemeanor.

It is no excuse for this novel attempt to say, that Judges take the same sureties for appearance and for the peace, and make the one the measure of the other; because they are certainly not obliged so to do, and might perhaps on some occasion see reason to do otherwise, and, besides that, a man might forfeit his pledges for the behaviour by some subsequent imprudence, altho' he might be acquitted of the charge which had occasioned them, and this could never be the intention of any legislature.

When the Archbishop of Canterbury and six other Bishops were called into the Council-chamber by James the II, and only pressed to enter into a recognizance, " They said, they were informed that no man was obliged to enter into recognizance, unless there were " special matter against him, and that there was oath of " it made against that person; and at last they insisted " there was no precedent that any member of the House " of Peers should be bound in recognizance *for misdemeanor*. The Lord Chancellor (Jeffreys) said there " were precedents for it; but being desired to name one, " he named none. Thereupon the Archbishop declared " he had the advice of the best council, and they had " warned him of this." Let me ask then whether the privilege of parliament is greater in one house than in the other?

Whether the warrant of Lord H. was only for a seditious or for a seditious and treasonable libel, makes no difference. The fact indeed is, that the * warrant, which was for apprehending

* George Montagu Dunk Earl of Halifax, Viscount Sunbury and Baron Halifax, one of the Lords of his Majesty's most honourable Privy Council, Lieutenant General of his Majesty's forces, and principal Secretary of State.

hending persons and papers, does not mention the word libel at all, but uses the terms, *a seditious and treasonable paper*; and the second ** warrant, which was for committing Mr. Wilkes to the Tower, makes use of the terms, *a most infamous and seditious libel*. So that there is a diversity of denomination and description observed by the drawer of the warrant, whether the same were the secretary of state, his law clerk, or the solicitor to the treasury. Then comes the Attorney General, who files his information *ex officio* against the writer, and charges him with writing a libel. Now, *he* certainly knows what he is about, whether the others did or not; and therefore there is no longer any room for dispute about the crime, it

These are in his Majesty's Name to authorize and require you (taking a constable to your assistance) to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper intituled the North Briton Numb: 45. Saturday April 22, 1763, printed for G. Kearsly in Ludgate-street, London, and them, or any of them, having found, to apprehend or seize together with their papers, and to bring in safe custody before me, to be examined concerning the premises and further dealt with according to law. And in the due execution thereof, all Mayors, Sheriffs, Justices of the Peace, Constables and all other his Majesty's Officers civil and *military*, and loving subjects whom it may concern are to be aiding and assisting to you, as there shall be occasion, and for so doing this shall be your warrant. Given at St. James's the 26th day of April, in the 3d year of his Majesty's reign.

Dunk Halifax.

To Nathan Carrington, John Money,
James Watson and Robert Black-
more.

** Charles Earl of Egremont and George Dunk Earl of Halifax,
Lords of his Majesty's most Honourable Privy Council and principal Secretaries of State.

These are in his Majesty's name to authorize and require you to receive into your custody the body of John Wilkes, Esq; herewith sent you for being the author and publisher of a most infamous and seditious libel, intituled, the North Briton, Number 45; tending to inflame the minds and alienate the affections of the people from his Majesty, and to excite them to traitorous insurrections against the government. And to keep him safe and *close*, until he shall be delivered by due course of law, for so doing this shall be your warrant: Given at St. James's the 30th day of April, 1763, in the 3d year of his Majesty's reign.

Egremont.
Dunk Halifax,

To the Right Honourable Lord John
Berkeley of Stratton, Constable of
his Majesty's Tower of London, or
to the Lieutenant of the said Tower
or his Deputy.

it is ascertained. Indeed, the King's message * to the House, delivered by the *Chancellor of the Exchequer* touching the same paper, calls it no more than a most seditious and dangerous libel, and the Resolution of the Commons execrates it but as a false, scandalous and seditious libel.

But a decisive argument upon this head is, that had the charge been other than a misdemeanor, it could not have been prosecuted in this way; for, no *information* will lie for a capital crime, or for misprision of treason. The statute says, they shall not lie for life or limb.

It is childish therefore to ask whether the printing of any particular libel, as for instance, of the *North Briton* N^o. 45, "is to be considered as no higher an offence than publishing a libel?" The Attorney says, "had it been adjudged to have excited, instead of tending to excite, it would have been no less a crime against the State, than that of high treason, without any palliation whatever:" to which I can only say in a plain way, that had it been adjudged to have been something else than a libel, it would not have been adjudged what it was; for, I do not know that any law-logic ever proved *libel* and *high treason* to be convertible terms. No two offences can be more distinct in their nature or kind. One is by *construction*, a breach of the peace, and the other is the highest of all capital crimes, by express statute.

To compass or to imagine (that is to excite to, or intend) the death of the King, is High Treason, and is punished with loss of life, by hanging, drawing and quartering, whether the King be killed or even hurt, or not. But this doctrine holds in no other crime whatever. For, in petty Treason, which is the next greatest crime that the law knows, and which is the murder of a husband by the wife, or of the master by the servant, the inciting of others to perpetrate the fact, or any attempt to do it oneself, without effect, is only punishable as a misdemeanor and as an assault. Let us not then be so impudently imposed upon as to be told, that every step we take in questioning the acts of a minister, is high treason. Every London or Westminster mob, every riot, every abuse of administration or of a party; every remark or animadversion upon a proclamation, or upon a speech from the throne, or in short,

* Vide the Printed Votes of Tuesday Nov. 15. 1763.

upon any other public measure of the ministry will in this way of reasoning soon be deemed Treason, to the disgrace of ourselves, the dishonour of our constitution, and the loss of the rights of a free people.

In truth, I likewise suppose the Attorney General knows his business too well to denominate any offence a libel, and to prosecute it by information only, if he means to have it considered as high treason.

Indeed, I have heard in discourse, that a certain laborious minister has whispered many of his friends, " whatever they might hear from others, that the law-officers of the crown had assured him, Mr. Wilkes might have been prosecuted for high treason; but however, they were not willing to push things against him to the utmost." An assertion that is scarcely to be paralleled (I believe) for its folly, profligacy or effrontery; and which, in a country where nothing can be done but by law, deserves no other answer than this, " I wish you had attempted it, for, if you had, it would have ruined you, and you would have deserved it, as the only adequate reward for your pains." The Epping-forest case would not warrant this position, I can assure him; and I am certain he has a private friend, a candid lawyer, who would strongly dissuade him from really making so ridiculous an attempt. I say this, because I suppose the minister himself, is now become so Right Honourable, that he ceases any longer to be learned in the laws of his country.

" The E. of Bristol, having exhibited a charge of Treason against the E. of Clarendon, alleged, That he had endeavoured to alienate the affections of his Majesty's subjects, by venting *opprobrious scandals* against his Majesty's *person*, and that he had traduced *both houses of parliament*. The Judges were ordered to give their opinion whether this be any treason or no? They unanimously agreed, That if the matters alleged in the charge were admitted to be true, altho' alleged to be *traitorously done*, yet there is no Treason in it."

Why then is the Attorney angry with any other man for talking of No. 45, as a libel? He himself with all his elaborate perplexity of language can call it no more? Why need he search for words to denominate " seditious writings, a subtle poison, the seed of jealousy, revolt and discord, the parent at least, if not the offspring,"

" of

“ of treason?” (Or why not both parent and offspring at one and the same time: the sense will not be hurt, and the creed more orthodox?) In every light he can put these writings, they will appear the same, their nature will not alter, they will still be but libels.

Indeed there is a great deal of difference between libel and libel, as between other individuals of one and the same species, some having more and others less wit, some being more and others less personal, some levelled against the establishment, and others against that varying thing a ministry. For example, *The Sixth Letter to the People of England* was a most gross attack upon the present constitution and succession; but *The Test*, *the Letter versified*, and *Radandos* were merely personal abuse upon Mr. Pitt, his Lady, and her eldest Brother. *Mock-Patriotism* took a middle flight between the abuse of one or two individuals, and that of a whole party; altho’ for the beauty of its images, the happiness of its allusions, and the elegance of its expressions, it was *rara avis* in this predicament of writers: none of whom however were without some wit and merit; excepting always, the dull and rancorous Jacobite first named. In truth, abusive satire has been dealt in pretty equally of all sides, and the only measure has been the abilities of the respective penmen. When somebody shewed a North Briton to old Johnson, turning his definition of a pensioner upon himself, he very cleverly answered, “ It is fair enough, I have no reason to complain,

“ *Nec lex justior ulla*

“ *Quam necis artifices arte perire sua.*”

After all, the Attorney himself cannot help speaking of the composition of libels as an exercise of wit, and thereupon “ supposing the author of *The Budget* may chuse by “ and bye to *amuse* himself this very way;” and then roundly charges this gentleman “ with personal indecency “ and his” supposed “ friend with acrimony, envy, spleen, “ conceitedness and self-importance” as mere flowers, I presume, of rhetorick, well becoming the pen of a ministerial writer against libels. And, he speaks of the ruin of a virtuous patriot by an information, with as much glee, as an old lecher does of the debauching of a comely virgin by ravishment.

Nobody

Nobody without doors thinks the case of any "libel justifies strongly," or at all, "the practice of general warrants," if it were only for this reason, that every party against whom a libel is levelled, always christens it seditious, treasonable and what not; and yet, whether it be any libel at all, no man has a right to pronounce, before a Jury of the country has determined it to be one. They are likewise less necessary in this than any other offence, because the publisher must always be known and may be come at, whether the author be so or not.

With respect to the warrant of Lord H. if the form had really been according to the "uninterrupted practice" of the Secretary of State's office," This would not have made it legal. But even this is not a fact, for one cannot help remarking that the old Tories under Queen Anne, the Revolution still tingling in their ears, were exceedingly cautious, consulting council, probably upon the warrant itself, before they ventured to take up a subject; insomuch, that all the warrants even of Lord Bolingbroke, whilst he was Secretary of State, appear to be strictly legal. In truth, there has been no uniform practice in the office, as may be seen by the variant and multiform warrants printed from thence in *Quarto*, and privately distributed to trusty friends by P. C. W. with the inscription of *most secret*. Much less would precedents only from the time of the Revolution be sufficient to justify such an illegal practice. And as to the pretence that this practice "did not then take its rise, having been frequent in former reigns, reaching back *perhaps* to the remotest times, and combined with the very essence of government," it is totally groundless; for, after the most diligent search, no warrants of a similar form could be found higher than the reign of the Stuarts, but few of them, and of those few hardly more than one of an antienter date than Bennet Lord Arlington, Secretary to Charles the 2d. From such premises, however, this hardened writer would insinuate, ~~that~~ perhaps they were used in the remotest times, and are of the essence of government. This notable antiquity of office is indeed further supported by a note, which takes notice that the act of Henry the 8th, settling precedency, mentions, among other officers, the King's Secretary. It does so. And what of that? This was the æra of the reformation of Religion; but, I never heard before it was

the commencement of civil government. No prior mention, however, of Kings Secretaries, as officers of State, could I suppose be found, and therefore this or none must be cited. Is this now, in the name of common sense, a proof of immemorial existence? The fact is, in antient times, the King had only a private Secretary for his Privy Council; there was no such person as a Secretary of State. He is the production of times within memory (to speak as a lawyer;) and none of the many books which treat of the great officers of State, and the *Aula Regis*, make any mention of such a Being. His consequence and power arose from his being admitted a Member of the Privy Council, as such alone it is that he can pretend to the power of commitment. This does not make him, however, a Justice of Peace, and more authority he never claimed. To render him so, it has of late been always the practice to insert by name every Privy Counsellor into the commissions of the peace, that from time to time pass for the several counties. So that the two grounds suggested as an authority for the issuing of these General Warrants, namely, the constant exercise and usage of them, and the antiquity of the Secretary of State as a Privy Counsellor, both fail. But, had they both been good, they would not have authorized these warrants; because, a practice of the like sort, must be supported by uniform usage; and, the warrants produced, differed so much in their form, that hardly any three of them were exactly alike. The greatest part too of the warrants offered in proof of this custom and pretended right, were issued in the times of rebellion; when men are not likely to call in question such a proceeding, the extremity of the case making them wink at all irregularities, for the sake of supporting the protestant establishment itself. And yet, had men, as one may easily figure to one self, will be apt to lay stress upon such acts of necessity, as precedents for their doing the like in ordinary cases, and to gratify personal pique, and therefore such excesses of power, are dangerous in example, and should never be excused, but when it appears that government could not be defended or upheld without actual recourse to them. But, even if the usage had been both immemorial and uniform, and ten thousand similar warrants could have been produced, it would not have been sufficient; be-
cause

cause, the practice must likewise be agreeable to the principles of law, in order to be good, whereas, this is a practice inconsistent with, and in direct opposition to, the first and clearest principles of law. Immemorial uniform usage will not even support the bye-law of a corporation, if it be flatly repugnant to the fundamentals of the common-law; much less, will it authorise the secret practice of a political office. In one word, no warrant whatever, in any case or crime whatever, that names or describes nobody in-certain, is good, or can be justified in law, in any circumstances whatever. Therefore, if that point alone had been put in question, I do not see how any "thinking" and honest man could have fairly voted against it." The law is too well established to be rendered doubtful, by all the dexterity of the Attorney or his Coadjutor. Eight years of ingenious judicature will scarcely accomplish so arduous a task.

The Attorney might as well say, that Lord H. when using the power of a Justice of the Peace by virtue of his office of Secretary of State, could make an illegal warrant as a Magistrate, good as a military Officer, by styling himself *Lieutenant General of his Majesty's forces*, and commanding all *military officers to assist as there shall be occasion*. This circumstance, tho' new, I am seriously of opinion, is as good an argument in law, as what can be derived from the usage of a Secretary of State's office.

Moreover, it is not true, even in a political sense, that a declaration of the illegality of all General Warrants whatever, would "take away from the executive power, an authority which may be frequently found essential to the very being of the State." For, if in case of High Treason (the only crime that need ever occasion a stretch of authority, and even That very rarely) there should be a necessity for the apprehension of people, whose names, or any certain designation of their persons, could not be had, and this was made afterwards to appear; as That is a crime which tends to the dissolution of the whole frame of government, there is no doubt but the Minister would be excused for the dictatorial power he should exercise, *pro salute Republicæ*, upon such an emergency. But I would have such things as emergent necessities applied to his pardon, and not to his justification.

Therefore, I see no reason why a man should not vote for the condemnation of General Warrants in all cases, without limiting his damnation to General Warrants in the case of seditious libels. "The propositions are different," but in the eye of the law, these General Warrants are in both cases equally illegal. In short, if this was not the constitution, I think, "we might amuse the public with the sound of liberty," but should really enjoy none. If such warrants were to be allowed legal or justifiable in any instances, it would be exceedingly difficult, nay impossible, to restrain Ministers from grievously oppressing any man they did not like, under many pretences from time to time, for their own safety, without any motive of public good. I agree, therefore, with the Attorney, in saying, that "if the liberty of the subject be the great object in view, and be incompatible with General Warrants in one instance, it is inconsistent with the same warrants in any other. There is no exception to be made to our *general* reasoning." The grievance extends to all persons, of all degrees, of all qualities; it is *commune periculum*.

As to the suggestion that experience has proved "there is only a possibility of danger to the liberty of the subject, from the exercise of this power," it is a most slippery argument, and of no real weight whatever.

For, in the first place, these warrants have been rarely exercised, until of late years, and perhaps never before, in the case of a libel, upon one of the Representatives of the people. Every thing of this sort is practised with some tenderness at first. Tyranny grows by degrees. Besides, few common men have private purses sufficient to contend with That of the Public and the power of the Crown, both of which are used by every Minister, to the utmost extent, upon such occasions. Sometimes too, the private prosecutor is bought off.

In the next place, if the experience of these warrants had been so great, and no mischief to the subject had hitherto ensued; yet, who, in a very momentous concern, no less than the liberty of every man in England, would let even a possibility of abuse remain, that was able to get rid of it. It is not within the power of any legislature, to prevent every private man or minister from committing abuses

abuses by an infraction of the law ; but, I think, no wise legislature would give such a sanction to any bad or arbitrary usage, as would afford a *handle* to all Ministers to be guilty of the greatest abuses, impunedly and under the colour of law.

Upon a supposition that the foregoing arguments will not do, the Attorney closes his ratiocination on this point, with saying, that " the Court of King's Bench had admitted persons to bail, apprehended under such warrants, instead of giving them their full discharge, and that this circumstance is of so much importance to the question, of the legality of the warrants, that in the opinion of an old experienced and able Lawyer upon the occasion, who will ever be esteemed an honour to his profession; it implies no less than an imputation of perjury, to suppose such practice to have prevailed in the Court of King's Bench, unless the legality of the warrants had been at the same time acknowledged by that Court." Now, who this old Lawyer is, I don't know, nor the date of the friendship between him and the Attorney. But, if I were to guess, it must be some old Tory, who till lately was as uniformly against, as he now is uniformly for, all measures. One of your staunch men, that goes plump through thick and thin, and to advance such doctrine, must, I think, have gone through the thickest of it, and consequently appear in a very dirty light to all other Lawyers upon his emerging. I dare say, 20 years ago, the same man would have vouched as strongly to the cure of the King's Evil by the touch of the true royal line. In my conscience, he could find no one Lawyer besides to countenance him in such doctrine ; or, if he did, it must be some antiquated gentleman of the same Tory kidney, who only comes out upon extraordinary occasions, with a grave face, to do extraordinary work. Now, the Tory-principles are such, that I should have been much better satisfied of the truth of this dogma, had the Attorney himself directly affirmed, upon the credit of his own character as a Lawyer, that an admission to bail under a General Warrant, proves either the warrant to be legal, or the Judge to be perjured. But, it is very singular that the Attorney will not affirm any thing from himself in this matter, any more than he did upon the article of usage, but chuses to slip in the assertion of some old stager

in Toryism, for the purpose, whom he puts in the front of the battle; and then, if he can but pick up some other superannuated being, of the like original concoction, he will, of the two, form a most excellent forlorn hope. By the bye, if any old Black Letter could be brought up to such an affirmation, in a grave and serious manner, as *amicus curiæ*, I should think, under any other than the present Whig administration, his merit would be so transcendent, that he might expect the Minister's interest for a peerage for himself, or otherwise for his son, as he should like best. At this time, however, I should imagine, he would only find he had absolutely thrown away his character to no purpose at all. Old Hunters say, there is nothing like trying a man at once at a six bar gate; for, if he ventures to take that, you may be sure of his going over every thing else with ease.

After all, let me ask, Does the Court of *King's Bench*, or any other court, when a man is brought before them, examine into the warrant, unless the person apprehended makes an objection thereto? Nay, is not the very contrary every day's experience? Is it not even the desire of the party taken up, nine times in ten, to be bailed; as he knows, upon his discharge from that arrest, another warrant in a regular form would be immediately issued? Would it be right therefore in a Judge to fortinize the validity of every *capias*? In truth, bailing is a matter of course; where no objection is taken; and there is no pretence for saying this act of course is an acknowledgement by the Court of the validity of the warrant, or of the regularity of the arrest. Every apprehension is supposed to be legally made. A man might as well suppose, that the Chancery reads every writ he signs, before it is issued, to see whether it be clerically drawn; or that a Judge never tries a cause at *nisi prius*, until he has examined the whole of the process, and seen all to be regular. Now, I will venture to affirm that Judges never examine the process at all, unless one of the parties move the Court specially for the purpose. *Consensus tollit errorem*. And, no man ever suggested that they broke their oaths by not doing this *ex officio*; indeed, if the extravagant doctrine here advanced were true, not one of the present reverend bench could now be free from perjury. In short, such a speech, if it were made, is a proof of nothing, but the shameful length

length to which party is capable of carrying a veteran's
 stagger : for, no lawyer ever practised in a court of law,
 especially at the head of a great circuit, that did not, in
 his own practice, meet with a multitude of instances,
 which flatly contradict this violent position. It happens
 to be an assertion, however, that is not very material,
 because, it is in the teeth of an ordinary fact that cannot be
 disputed ; every common lawyer of a year's standing be-
 ing able to vouch it. Nay, were it not so, the Attorney
 knows it to be a maxim among lawyers, that " what is
 " done without debate, or any argument or consideration
 " had of it, makes the authority of a precedent to be of
 " no force in point of law : for, judgments and awards,
 " given upon deliberation and debate, only are proofs and
 " arguments of weight ; and not any sudden act of the
 " court without debate or deliberation."

The Attorney fees nothing alarming in the seizure of
 a Member's papers and bureaux upon the charge of a libel
 only ; and reproaches a late writer with " heightening the
 " the picture upon this occasion, by the introduction of
 " facks and messengers." Now, I understand nothing is
 mentioned by this writer, that was not an undoubted
 fact, and, if I know the Attorney aright, he likes to de-
 bate upon a fact, and for that reason would throw every
 circumstance into a case, however unnecessary this may
 seem to many people, who think it best always to argue
 and determine upon the general principle. Provided then
 the fact be so, I can frame to myself, no circumstance
 capable of adding to the terror of such a scene, whilst
 laws exist, unless it be the representation of the whole
 as transacted, and by particular order, at midnight. I
 chuse, however, not to dwell upon this lawless part of
 the story, and, as my son in his letter hath said a good deal
 about the absolute illegality of the seizure of papers, I
 shall here say very little more concerning this abominable
 outrage ; altho', I think it, to use the words of Mr.
 Somers, " the worst means to arrive at the worst ends
 " imaginable."

According to my notions, no words can convey to the
 mind of the reader, the anxiety which a man may feel
 from such a distress. Many gentlemen have secret cor-
 respondences, which they keep from their wives, their re-
 lations, and their bosom friends. Every body has some
 private

private papers, that he would not on any account have revealed. A lawyer hath frequently the papers and securities of his clients; a merchant or agent, of his correspondents. What then, can be more excruciating torture, than to have the lowest of mankind, such fellows as Mooney, Watson, and the rest of them, enter suddenly into his house, and forcibly carry away his scrutores, with all his papers of every kind, under a pretence of law, *because* the Attorney-general had, *ex officio*, filed an information against the author, printer and publisher of some pamphlet or weekly paper, and somebody had told one of these greyhounds, that this gentleman was thought by some people to be the author! These papers are immediately to be thrown into the hands of some clerks, of much curiosity, and of very little business in times of peace, who will, upon being bid to sort and select those that relate to such and such a particular thing, naturally amuse themselves with the perusal of all private letters, memorandums, secrets and intrigues, of the gentleman himself, and of all his friends and acquaintance of both sexes. In the hurry too of such a business, notes, bonds, or even deeds, and evidence of the utmost consequence to private property, may be divulged, lost, torn or destroyed, to his irreparable injury.

I will now, for a moment, suppose that this gentleman had actually wrote, in the hours of his wantonness or folly, something that was really abusive and scandalous upon some particular minister, or upon the administration in general. Even in such a case, would any gentleman in this kingdom rest one minute at ease in his bed, if he thought, that for every loose and unguarded, or supposed libellous expression, about party-matters, he was liable not only to be taken up himself, but every secret of his family made subject to the inspection of a whole Secretary of State's Office, or indeed, of any man or minister whatever, whilst a parliament was sitting, or had even an existence in the country.

Such a vexatious authority in the crown, is inconsistent with every idea of liberty. It seems to me, to be the highest of libels upon the constitution, to pretend, that any usage can justify such an act of arbitrary government. The laws of England are so tender to every man accused, even of capital crimes, that they do not permit him to be
put

not to torture to extort a confession, nor oblige him to answer a question that will tend to accuse himself. How then can it be supposed, that the Law will intrust any officer of the crown, with the power of charging any man in the Kingdom (or, indeed, every man by possibility and nobody in particular) at his will and pleasure, with being author, printer or publisher of such a paper, being a libel, and which, till a jury has determined to be so, is nothing; and that upon this charge, any common fellows under a general warrant, upon their own imaginations, or the surmises of their acquaintance, or upon other worse and more dangerous intimations, may, with a strong hand, seize and carry off all his papers; and then at his trial produce these papers, thus taken by force from him, in evidence against himself; and all this on the charge of a mere misdemeanor, in a free country. This would be making a man give evidence against and accuse himself, with a vengeance. And this is to be endured, because the prosecutor wants other sufficient proof, and might be traduced for acting groundlessly, if he could not get it; and because he does it truly for the sake of *collecting evidence*.

I should not have given myself the trouble of saying thus much in so plain a matter, had it not been for a letter which was printed some time ago, upon this subject, with the names of two noble lords, secretaries of state, subscribed. It is directed "to Mr. Wilkes," dated "Great George-street, May the 7th, 1763," and contains the following expressions:

"S. I. R,

"In answer to your letter of yesterday, we acquaint you, that your papers were seized in consequence of the heavy charge brought against you, for being the author of an infamous and seditious libel, for which, notwithstanding your discharge from your commitment to the Tower, His Majesty has ordered you to be prosecuted, by his Attorney-general. Such of your papers as do not lead to a proof of your guilt, shall be restored to you: Such as are necessary for that purpose, it was our duty to deliver over to those, whose office it is to

G

"collect

" *collect the evidence*, and manage the prosecution against
 " you. We are

" Your humble Servants,

" Egremont.

" Dunk Halifax."

Here now is a clear avowal of the principle of taking these papers. The evidence indeed, seems to have been *collected* with as much force, and I believe with as little right by law, as some other collections are made for which the collectors are hanged when taken. I cannot but say, therefore, I am very glad this letter has been published, that the Public may see what is the notion of law in those political offices, that are now attempting to prove their lawless practices to be the ancient common law of the Land.

One Instance of the legislature's regard to the privacy of papers and correspondence, may be seen in the act, regulating the post-office, whereby, every post-master and clerk, is forbid to *open* any letter, upon any pretence whatever, except, by warrant of one of the principal secretaries of State; who, if the mere opening should afterwards be questioned, is thereby rendered under his hand responsible for the same.

When the D. of Newcastle was minister, under a general sweeping warrant, the messengers seized some copper-plates of the late Rebels' victories, whereupon the owner commenced an action; shortly after which Mr. P. his attorney, was called upon by a certain noted solicitor, who told him, that the Government would not return the plates, but would, however, make satisfaction for them. Mr. P. said, that he would not dissuade his client from making up the matter, but, that as the seizure was wholly unwarrantable, he must be handsomely repaired in damages, and therefore, he would not advise him to take less than 200l. upon such an occasion. The noted Solicitor agreed to, and paid the sum demanded, upon having a release of the action; altho' it was very clear, the real injury did not amount to 50l. Thus dropped and expired this action, as has been the case with many others before and since. In short, one way or other, the proceedings in these matters never come before the Public. The Parties

Parties are either too indigent to contend with the Crown, or else the Crown buys them off. Attornies too, for the most part, are afraid both of incensing men in power and of losing their costs, by being concerned for poor and obnoxious clients, who may either run away or be tampered with by the Solicitor for the Treasury. For which reasons, it is extremely difficult to cite adjudged cases, in such very clear points: and, therefore, one must decide upon upon them by general maxims and principles of common law, which are, indeed, a much more unerring guide than any particular case, of which it is ten to one whether you can obtain any correct and authentic report.

If such a power of seizing papers could be supported by law, is it to be imagined that no declaration of it should have been made from the Bench, by the several able and learned Chief Justices of England, who have presided in the King's Courts since this practice has taken place. Many of them have been warm friends of administration, and they could not have rendered a minister so formidable, especially in times of violent party and dissension, by any other means whatever. Nay, some of them have had opportunities of making this declaration, and yet have studiously avoided it, for which no reason can be assigned, but their knowing the practice to be illegal. A stronger negative argument can hardly be produced.

Nothing, as I apprehend, can be forcibly taken from any man, or his house entered, without some specific charge upon oath. The mansion of every man being his castle, no general search-warrant is good. It must either be sworn that I have certain stolen goods, or such a particular thing that is criminal in itself, in my custody, before any magistrate is authorised to grant a warrant to any man to enter my house and seize it. Nay further, if a positive oath be made, and such a particular warrant be issued, it can only be executed upon the paper or thing sworn to and specified, and in the presence of the owner, or of somebody intrusted by him, with the custody of it. Without these limitations, there is no liberty or free enjoyment of person or property, but every part of a man's most valuable possessions and privacies, is liable to the ravage, inroad and inspection of suspicious ministers, who may at any time harass, insult and expose, and perhaps,

undo him. Nay, whenever they suspect there is evidence against themselves, they may, by this boundless authority, seize and carry it away, in order to defeat prosecution.

In misdemeanor, felony or treason, before conviction, the personal property of the accused, remains unaltered; no magistrate has a right to examine the whole, nor to seize any particular part, without some special information on oath as to individual things. And upon what legal foundation, a contrary practice has been set afoot, I am totally at a loss to guess.

The first warrant that ever was granted for seizing papers generally was, by Lord Townshend, in the reign of George the 1st, until that time, no secretary of state, ever went farther than to direct the seizure of some papers particularized.

In such a party-crime, as a public libel, who can endure this assumed authority of taking all papers indiscriminately? When, in such a crime as Forgery, or any other felony; or even in that dangerous crime, high treason by correspondence with traitors or the king's enemies; all men would cry out against it, and most deservedly! Nothing can be touched without some criminal charge in law specifically sworn against it. And where there is even a charge against one particular paper, to seize *all*, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice. We can have no positive liberty or privacy, but must enjoy our correspondencies, friendships, papers and studies at discretion, that is, at the will and pleasure of the ministers for the time being, and of their inferior agents!

Had Charles the second thought his ministers intitled to this prerogative, he would not have resorted to parliament for sweeping warrants, to search for and seize all seditious and treasonable books and pamphlets. His messenger of the press would have ranged through the shops of booksellers and printers, and the studies of disaffected persons, that is, of sticklers for liberty, upon the mere warrant of a secretary of state or privy counsellor, without the aid of this licensing statute.

And let me here ask a question. If a libel be no actual breath of the peace, and surerries for the peace or the be-

behaviour be not demandable of the supposed libeller ; by what colour of law, or by what warrant or *capias*, can any man charged as the writer or publisher have his doors and locks broken open, for the apprehension either of himself or his papers? Can such force be authorised by virtue of any legal process whatever, in this species of misdemeanor, before verdict, nay before judgment?*

The Attorney having slightly passed over the seizure of papers, after talking of it as a mere picture for which he happened to have no taste, *intirely* omits the subsequent grievance of the *close* confinement ; and, my son, having somewhat touched that matter in his letter, I shall not expatiate upon the subject, so much, at least, as the importance of it would otherwise have inclined me to. Any body, however, who looks at the warrant of commitment, will see the direction to the constable of the Tower, is not merely to keep Mr. Wilkes safe, but “ to keep him safe and *close*, until he shall be delivered by due course, of law.” Now, the custody here directed, is un-

* In a printed account of the transaction of Mr. Wilkes' case, it is stated thus. “ The 26th of April, a general Warrant was issued against the Authors, Printers and Publishers of N^o 45, and 49 Persons were apprehended by it before the 29th, and among them a reputable tradesman. This last was taken out of bed from his wife and a child dangerously ill, his house disordered and his papers ransacked, and his person detained three days after his innocence known. The 29th, the Secretaries of State received complete information that Mr. Wilkes was the author and publisher ; and, the general warrant still remaining in the messengers hands, by virtue thereof, on the 30th, Mr. Wilkes's house was forcibly entered, his doors and locks broken open, all his papers thrown into a sack and committed to the hands of common messengers, without any schedule or security for the return of them, Mr. Wilkes himself was carried before Lord H. where it was immediately made known that an *Habeas Corpus* was applied for and expected every moment, but, to avoid the effect of that writ, he was hurried away to the Tower, and there all access was denied to him, as well as the use of pen, ink and paper.” And I will add, from my own knowledge, that those who had the searching of his papers divulged the contents of some private letters, which might have been very prejudicial to the writer of them, and have hurt his interest and his friendship with other friends.

It has been asserted that, in search of Monsieur D'Eon, found a libeller by a Jury, in order to take and bring him into the King's Bench, to receive judgment on the verdict, the doors and locks of chambers, closets and scrutores, were broke open ; altho' it was denied he was there, and it afterwards appeared he was not there. This was said to be done by virtue of a *Capias* from the K. B. by some, and by others of a Secretary of State's warrant, but without any information upon oath of his being in such house, and merely upon a slight suspicion, that he might be there, grounded upon his having been seen about two months before going to the house.

warrantable in law, in the case of a misdemeanour, nay in any case.

The common commitments used by Justices of the peace, even in cases of robbery on the highway, and other felonies, not entitled to clergy, are *to receive into your goal, and him safely to keep, or that you safely keep, or there to remain (untill delivered by law)*; *salvo custodiri, ad salvo custodiendum, salvo custodias, in salva custodia ut detineatur*, or at most *salvo & secure custodiri*: infomuch, that out of all the various forms of mittimus's to be met with in *Burn's Justice*, or the *Registrum Brevium*, there is not one where the word *close* or *arcta*, is inserted.

When a goaler is to keep his prisoner safe, he is only to restrain him so as to prevent his escape, and no person not dangerous, in that respect, is to be hindered from having access to him, in the day-time. But, when the order is to keep the prisoner safe and *close*, the goaler is to shut him up from all the world. By a printed paper too, handed about, I learn that the warders of the Tower, in this last case, are never to leave their prisoner one moment alone. And, in a paper which Mr. Wilkes dispersed, he asserted that these orders were strictly observed with respect to him, infomuch, that altho' he was committed Saturday the 30th of April, yet it was Tuesday May the 3d, after having been brought up by Habeas Corpus to the Court of Common Pleas, and remanded, before his friends had for the first time, free access to him. His Council and Attorney had made repeated applications for admission on Saturday, Sunday and Monday, as well as his brother, a noble Earl, and several people of distinction; and on the Monday, he happened to see himself a written order upon Major Ransford's table, directing him even to take down the names of all persons applying for admittance. The common report about town was, that the secretary of state went to his country-house on the Saturday morning, and did not return till Tuesday noon, and therefore no order for the admission of any person could he had, and that the Major would not break through his general orders about *close* prisoners at the desire of the solicitor of the treasury: but, this could never be the reason, as it was very easy to have sent a messenger 10 or 12 miles out of town, to the secretary's villa, when the

the prisoner was a Member of Parliament, and the public begun to be alarmed.

I am more inclined to believe another report, namely, that the Major received, particular, positive, verbal orders at first, to let nobody have access to him, and that he declared, had it not been for Those, he should not have scrupled to have let in any of Mr. Wilkes's friends or relations, notwithstanding the word *close* was inserted in the warrant. In short, it was a misconception of the lawful power. The great civil officers imagined there was no difference at all made by the law between the treatment of a prisoner committed for a misdemeanor, and of one for a capital crime, or before or after conviction.

Now, my opinion is, that before conviction the law does not warrant close confinement, so as to debar a friend from access, in any case whatever; and that the same is a breach of the great *Habeas Corpus* law, and of all the statutes *de Homine replegiando*. For, if a man when apprehended and carried before a magistrate, is, by that magistrate committed forthwith to close custody, so that nobody can get at him, it will be impossible for him to write a letter, or to make an affidavit, to get a *Habeas Corpus*. Indeed, it seems to me to be an absolute deprivation of the right that every subject has to his liberty, "unless it shall appear that the party so committed, is detained upon a legal process, order or warrant, out of some court that has a jurisdiction of criminal matters, or by some warrant of some Judge or Justice of Peace for such matter or offence for which by law the prisoner is not bailable." This statute of Charles the 2d, takes notice of the "great delays and other *Shifts* of goalers and others, contrary to the known laws, whereby, many of the King's subjects, may be long detained in prison, in such cases, where by law they are bailable, to their great charges and vexation," and purports to be expressly enacted, "for the prevention thereof, and the more speedy relief of all persons imprisoned for any criminal or supposed criminal matters." Now, if I do not misremember, the five members were committed to *close* confinement, for seditious discourses in parliament, by Charles the 1st, and it was the agitation of this very question that first shook his throne; and yet, I do not know, that in the case of Mr. Wilkes,

Wilkes, it has ever been taken notice of at all, either in parliament or in any court of Justice.

I look upon close custody in such an offence as a libel, the least definable and the most ambiguous of all misdemeanors, and by construction only a breach of the peace; to be not only absolutely illegal, but extreme cruelty in itself, and, with respect to the constitution, the most lawless tyranny that can be exerted by any minister, and such as ought to make every gentleman startle, when he thinks of it only:

It is not the corporal injury that constitutes, in the eyes of mankind, the dreadfulneſs of the example. It is the force exerted and continued againſt law:

When I ſee a ſecretary of ſtate, obſtinately fighting with the laws of his country, uſing privilege to the utmoſt, notwithstanding it was the ground of the royal complaint to the Commons againſt Mr. Wilkes, availing himſelf of every practicable eſſoign, and, at length, withſtanding all the proceſs and penalties of a court of Juſtice, to avoid trying the right of a tranſaction, which has never yet been directly given up; and perhaps waiting for an outlawry of his proſecutor, in order then to mock the juſtice of his country ſtill more, by entering an appearance to the ſuit againſt him, at a time, when his proſecutor can no longer go on with it: I proteſt, altho' an old, ſober, private individual, that I loſe my temper, look for redreſs from ſome other quarter, and feel myſelf inclined to join in an addreſs to the commons of England, to take up the conſideration, and go on with the proſecution of that cauſe, which every Freeman is intereſted in, and which the ordinary courts of juſtice have been ſo long ſoiled in. I remember what is Mr. Lock's definition of liberty; what he makes the province of a court of judicature; what the extent of the legiſlative power; and what, according to him, creates a diſſolution of all government.

Who under ſuch circumſtances would blame a Juſt, ſhould they at laſt have ſuch a ſecretary brought before them, for giving extraordinary, exemplary damages, in terrorem! Eſpecially, if they ſhould have all imaginable foundation for believing the judgment upon ſuch verdict, will be delayed by every artifice of bills of exceptions, ſpecial verdicts, motions for new trial, writs of error, &c. that

that can be practised, in order to prevent all effect from it, and to overbear, in the long run, the poor prosecutor by dint of expence.

If mankind is to be enraged, I really think this is the readiest way to effect it.

If a questionable act has been done by the great officers of a state in any just government, and when taken notice of, they avoid a decision of the established courts of law, I will say they dis-serve the Crown by such conduct, let who will advise it. It is unbecoming men who pretend to an honourable repute or a justifiable behaviour, and incredible where an administration means only to use legal powers or desires to know what they are.

No jury will give great damages where a minister pleads law for his excuse, and readily resorts to a court of law for its opinion, in order to shew the truth of his plea. But where he shuffles and cuts, flies to privilege and chicanery, and avoids a court of law, or keeps it at bay, he will not only have every presumption in disfavour of him, but will raise the resentment of every man, and should the slow foot of justice at last overtake him, nobody will think it can treat him too severely, as an example to all future ministers.

How can any minister think of eluding the laws, when he considers that kings, the supreme magistrates of this country, hold their crown by no other tenure, and are sworn and bound by law, at the peril of that very crown itself ! Our constitution admits of no arbitrary will or pleasure in any man. The law is the sole sovereign of England, and That law is known and settled, on the firm basis of immemorial usage, innumerable precedents through a succession of ages, and upon the statutes of king, lords, and commons. And, it is this circumstance which makes the security, the independence, and the pre-eminent felicity of Englishmen. What a comfort is it to every man, who either raises or inherits a fortune, to hold That and his liberty by the same and as good a title as his King holds his crown ? Who therefore, can sink so low as to submit to enjoy, all that he has, by the mere grace and favour of a man like himself, instead of holding it independent of every thing upon earth, but the known laws of his country.

It would, in my poor opinion, be of infinite use to young men of fortune, beginning the great world, who may hereafter be ministers of state, to read attentively the first 15 years of the reign of Charles the I. and the 12 years immediately preceding the Revolution. They would thereby perceive, what mighty ill consequences flow from small beginnings, and particularly, from right not being to be had for the subject in courts of Justice.

The Attorney wonders, what should occasion any "alarm" and says, one would think, "that some innocent man had been oppressed by arbitrary violence, "tyranny, and persecution." To which I shall only say, that the legality of the arrest itself by virtue of such a warrant, and not the innocence of the man arrested, is the matter in question.

The Attorney might as well talk of the qualities of the writer's mind, and endeavour to shew that he was a ludicrous, extravagant, profligate, debauched and blasphemous fellow, and wrote an infamous poem, whereby he excited the indignation of a grave and pious nobleman, who, from a motive of conscience complained of him to the house of lords, for disporting himself in the works of Vice; and that therefore, such a man might be treated as administration should please, without any regard to law or the constitution, and that, instead of protecting the franchises of their countrymen, the parliament should only settle the morals of individuals, like the Courts Christian of Bishops.

The Attorney concludes on this head with asking, whether all the printers and other "parties aggrieved, deny "that they have had ample satisfaction?" whereby he indirectly admits that they had been *aggrieved*, but then insinuates, that as money is in his mind the measure of all things, and an adequate consideration either for a broken head or a broken constitution, so there has been no harm done at all, but what is now compleatly paid for. Let me ask, were these damages offered or even paid voluntarily, so soon as the unlawfulness of the act was discovered? Or, were they extorted, by the verdict of a jury; after every means to delay and to defeat the action, to stagger the Judge who tried the cause (but who was too firm to be frightened, and too able to be imposed upon) and finally, to suspend indefinitely the judgment upon this verdict, by a bill of exceptions, had been tried in vain? After
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all this, were the exceptions tendered with such earnestness, and so much appearance of sincerity, ever argued or deemed capable of support in any court of law whatever? Or, were the persons, who took them, after these fruitless attempts to delude mankind, under the sacred names of law and constitution, obliged, like convicted jugglers, to give up the game, and, as the last shift, to buy off clandestinely the verdicts so publicly obtained, in hopes, by a private barter of satisfaction and release from low and ignorant prosecutors, to nick an attorney, who had laboured a just and a national suit, out of his costs? Is this, or is it not the Truth; and is or is it not a handsome come off, or a reputable way of giving up a great cause, where the Crown has thought proper by its Attorney General to take up the defence? *Sume superbiam quasitam meritis.*

But, in God's name, what have damages to do with the great point the Attorney is arguing, whether the Commons of England should or should not come to a strong resolution upon such an infringement of the constitution. Most people are of opinion, when a power, dangerous at any time to be exercised, is made use of in an ordinary point unnecessarily, the parliament should immediately brand so violent and irregular a step, and, if the circumstances required it, stigmatize the person who took it. The less the occasion was for this illegal act, the more alarming it is, because it looks as if great men chose to act by the authority of the crown, instead of acting by that of the law, and the more it had become of late the usage to exercise this power, that is, the greater sanction it might seem to have derived from any uninterrupted practice of 20 or 30 years, the more necessary it might seem to come to such a resolution: especially, too, if this power had been evidently abused, by being exerted in the case of a misdemeanor, and even in the most dubious of all misdemeanors, and above all, if it were in a time of the profoundest tranquility, when all parties were striving who should be foremost in shewing their sincere attachment to the person of their Sovereign. A power notoriously and confessed illegal, seems to need no great examination, but if it did, people without doors are apt to think, that those within should have given it that examination, and all the "gravity and deliberation," by going into a Committee,

that one of their resolutions might seem to require. It was early in the Session, when this matter was agitated, so that there was no want of time, and it was a point that interested peoples attention more than any other. If the Resolution were confined to the case in question, and so drawn as to apply to it exactly, it could neither appear "insufficient or futile." The conduct of the present parliament proves this; for, it has shewn that it chuses to go so far as the case before it, and no farther. In the matter of privilege recently agitated, the Commons confined their Resolution; and the Lords followed them therein, to the single case of seditious libels. And yet the rumour is, that many members of both houses thought it a proper opportunity for coming to a general resolution, taking away privilege from all breaches of peace, whether actual or constructive, and from all misdemeanors whatever. This, therefore, is a flat answer to the Attorney, upon the present head. However, I must allow it is reported, several great commoners contended warmly that the Resolution touching warrants should have been general, declaring General Warrants illegal in all cases whatever. It appears too, that the motion first made to the House was of this kind, and it is said, that the King's Attorney and Advocate General, were the persons who moved the amendments, which reduced this general motion to the simple case directly before them. Howbeit, as the present parliament has in these two instances, shewn its approbation of coming to resolutions only upon the cases that have actually happened; neither the Attorney nor myself, are at liberty to gainsay it. As they have adopted it, I cannot suffer myself to say, that "a resolution upon the journals, confined to the case of seditious libels only, left the warrants, in all other cases, still more confirmed and authorized by that tacit approbation." I do not think so. And I will venture to ask him, whether he thinks that the parliament, by declaring no privilege lies in the case of that single misdemeanor, a libel, has thereby tacitly approved and confirmed its privilege in all other misdemeanors. I should rather reason, that when a parliament condemns any thing in one case, it intimates a disapprobation of every similar case and of every the like species, altho' not named expressly in their resolution. Indeed, were I capable of thinking, that the Gentlemen,

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who opposed the general resolution first proposed about warrants, and stated, contended for and carried a resolution adapted only to a particular case, which the House thereupon took for its question in the debate, intended thereby a *tacit approbation* of and *more to confirm and authorize* the practice of General Warrants in all cases but that, I confess, I should be more alarmed than ever. But, I dare say, the Attorney here reasons from himself, and not from any Authority of state.

But the Attorney, however, is afraid that the Lords might differ from the Commons, either as a house of parliament, or as a court of judicature. This is impossible in a perfectly clear case. Nay, I can rid him of such fear, by what happened this very session. Let him only look back to the proceedings; and he will find that the present parliament took notice of *The North Briton*, No. 45, in consequence of the King's message, and upon the mere view of the paper itself, without inquiring into the truth of any circumstances, that the author might rely upon or the public's opinion of his intent thereby, determined it unanimously to be a libel; and yet, this is not only what great Judges esteem a mere point of law, but what by some is held to be a very difficult point of law. This was done too without any previous communication with the Lords. The Commons even went farther, for, they afterwards called for evidence, in order to find out who was the author, and it appearing to them, altho' by witnesses not upon oath, that one of their own members was, they expelled him, after sitting, debating and deliberating on their conduct 'till half an hour after three in the morning. Now, this last was a fact, which by the constitution of this country, is to be tried by a Jury. Nay, the Commons came to both these resolutions, whilst the same matter was in a course of trial before a Jury in the courts below; where it was possible that it might be differently determined. For, nobody can tell what a jury will do in a libel; and they generally determine both the law and the fact, as it is called **: but, suppose them to be so docile as to find

* Vide the printed Votes of Thursday Jan. 19, 1764.

** This very thing happened in New York in America, where the form of government is the same as in England; the Governor, Council and Assembly, answering to King, Lords and Commons. Now, in the case of one Zenger,

And only that such a man had published the paper, and to leave the construction thereof to the Court, and that the Judge who presided was one of those intrepid magistrates who do not care at all for the resolution of a House of Commons upon a point of law; it is surely, very possible, that such a Judge might have made a different determination from what the House had done. And then even this Judgment might have been carried "by appeal to the Lords, who in their judicial capacity might think fit to declare the legality of" the paper in question, "to confirm the practice" of discussing without doors the truth of the speech from the throne, and to affirm the judgment of the King's Bench. Notwithstanding therefore, this matter was in a way of trial below, and notwithstanding the Lords, both as a House of Parliament and a Court of Judicature might have differed from the Commons, yet they determined both the law and the fact; without being afraid as the Attorney is for them either that the Courts of law must be divided and confounded in their opinions, or that the dignity of the House of Commons must suffer in the neglect and contempt of their resolution." They judged, I presume, that in a clear matter such difference of opinion could not arise, that the paper was clearly a libel, that it was a matter of national moment not to be procrastinated, and that therefore, they not only might, but ought to pronounce their opinion upon it. According to the Attorney's doctrine, a House of Commons should not venture to declare that two and two make four, before a Court of law has told them so. But, in short, this has never been their practice. It is not fit they should interfere where the public is not deeply interested, but where it is, they are bound to do so, in justice to their representatives, and they always have done so. Nay, they have gone further, and where the necessity was great, they have even come to

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Zenger, a Printer, the "Council by their Resolution, declared the papers published by him to be *false, scandalous, malicious and seditious libels*. As the Jury upon his trial were upon their oaths, and thereby bound to deliver their own opinions, and not that of the Council, they thought themselves obliged to acquit the prisoner, by returning a verdict, *not Guilty*; which is the Verdict every Juryman is in conscience bound to return, if he thinks that the prisoner is not guilty of the crime charged in the Indictment or Information." Preface to Zenger's trial, which contains many things very well worth reading.

a resolution in point of law, contrary to the judgment of a court of law, and to the opinion of ten out of twelve Judges. Where they suspected any undue influence, either in the exertion or the support of Prerogative, by Officers of the crown or by Judges, they have always interposed. Is it possible to forget or to controvert either their conduct, or the propriety of it, in the great case of ship-money, which was first brought into question by Mr. Hampden, a private gentleman, who, so far from regarding the trumpery, pettifogging consideration of damages, declared that he would not pay it were it but one farthing, if pretended to be demanded of right and by colour of law, and, yet proceeded, according to my Lord Clarendon's own account, with great temper and moderation in that suit. His Lordship adds, and all the world knows, that never any cause had been debated and argued more solemnly before the Judges; who, after long deliberation among themselves, and being attended with the records, which had been cited on both sides, delivered each man his opinion and judgment, publickly, in court; and so largely that but two Judges argued in a day. Ten of them solemnly pronounced their opinion for the right claimed by the crown, and which it had regularly exercised for four years immediately preceding; but, as Lord Clarendon observes, the judgment proved of more credit and advantage to the gentleman condemned, than to the King's service. However, adds he, these "errors in government were not to be imputed to the court at that time, but to the spirit and over-activity of the lawyers of the privy-council, who should more carefully have preserved their profession and its professors, from being profaned by those services, which have rendered both so obnoxious to reproach." In short, the House of Commons entered into the public grievances, and notwithstanding the right of levying ship-money was a mere point of law, and there had been the fore-mentioned solemn adjudication by the whole bench of Judges in it, they ordered that the records, enrolments, judgments and proceedings in the Exchequer, and all other courts whatsoever concerning ship-money, should be sent for, and warrants signed by the Speaker, directed to the officers of the several courts for these matters, were issued accordingly. In consequence of this, a committee was appointed, and upon the report

of that committee, the Commons resolved, " That the charge imposed upon the subjects, and the assessments for that purpose, commonly called ship-money, are against the laws of the realm ; and that all the writs, commonly called ship-writs, and the judgment in the Exchequer in Mr. Hampden's case, in the matter and substance thereof, that he was any-wise chargeable thereby, are against the laws of the realm." In the matter of libel, they considered the case of Burton, Bastwick and Prynne, and resolved, the judgment and sentence of the court of *King's Bench*, to be illegal and unjust ; and, so they did in the case of Lilburn. In the same session of Parliament the Commons entered into a consideration of the ecclesiastical power by law, and of " the several constitutions and canons, treated upon by the Arch-Bishops of Canterbury and York, presidents of the respective convocations for those provinces, with the rest of the Bishops and Clergy, and agreed on, with the King's licence, in their several synods ;" and resolved, " That the said canons and constitutions do contain in them many matters contrary to the King's prerogative, to the fundamental laws and statutes of this realm, to the right of parliaments, to the property and liberty of the subjects, and are matters of dangerous consequence." The same parliament likewise took notice even of the transactions in another kingdom, and resolved that several proceedings by the Lord Lieutenant of Ireland were unjust and illegal ; and that the Judges there were fit to be questioned as criminal, for their extrajudicial proceedings and opinions. From multitudes of instances, where the Commons have come to a resolution with respect to matters of law, I have only selected these few, in order to shew, that they have done so, when the House was filled with great, constitutional lawyers, where the same point had been already and differently determined by a court of law, and even by all the Judges ; in matters of universal concern, and in particular cases, and even with respect to libellers, in points of both Common and Ecclesiastical law ; within and without the realm of England : and that this they have done without any conference with the Lords, and not as a foundation for any bill, and, yet their resolution has been obeyed and conformed to ever since as law, by every court of judicature in the kingdom.

A resolution of the present House of Commons would be equally respected, I doubt not, whatever big words any man may throw out to the contrary, by every Judge; and I never knew a dealer in such sort of speech that had a single grain of true spirit or bottom, when he came to be tried. This being the practice of these guardians of the people's rights, upon former occasions, makes me more curious than ever to know what it was that influenced the present parliament, after inquiry and proof of General Warrants being clearly contrary to law, to refrain from condemning the usage of them. The more especially, as it will appear hereafter by the Votes and Journals, that a gross complaint had been made of the abuse of these warrants, in the case of one of their own Members, and that the debate upon the question of their validity, had been the longest to be met with since Parliaments have had a being. We, who are living know very well from the Members of all parties, that nobody attempted to vindicate the legality of these warrants; but, our posterity will not have the same oral satisfaction, and must naturally conclude, from their not being declared illegal, according to the antient usage of the House in matters of like universal concern, that something appeared which rendered the point of law very problematical. Indeed, it must from reason seem to every reader, that altho' the House inquired into the matter, on account of its infinite consequence, yet, that it could not be warranted in passing a censure upon those who had used these warrants, nay, was on the contrary obliged to hold them justified, and to discharge the complaint against them, however much the House might wish to damn such warrants, if not in all cases, yet, at least, in that of misdemeanors and libels, and with that view had apparently narrowed the first proposed resolution to one of a particular nature. The natural conclusion * from the printed votes and journals must be, that the Commons could not find a ground for condemning General Warrants in all cases, or even in the single case of a libel, altho' accompanied with an order to seize papers; inasmuch, that I should think an able man would hereafter alledge the present proceedings, as a justification not only of these General Warrants, for the seizure of persons, but also of
I papers,

* Vide the printed Votes of Jan. 20, Feb. 20, 23, 14, and 17, 1764.

papers; even in the case of a misdemeanor, so that this usage will be apt to gain strength from what has passed, as *non regredi est progredi* in such an enterprize as this. The single obiter saying of a Judge at *Nisi prius*, or even the judgment of a Court of law, will not be sufficient to restrain future ministers, hurt by what is published against them, from using this general, sweeping power, when they find, that a House of Commons will not interfere in the case, except to vindicate the persons who use it. For which reasons, I wish, with all my heart, this affair had never been agitated in parliament; because I am sorry that any time-serving Judge hereafter, should have so good a pretext for using his discretion in the determination of the point, and for not being afraid of Parliaments calling him to an account for what he should do.

It is however a point of very extensive consequence both to the liberty and property of every man, and the Attorney therefore is a little too dogmatical, in concluding that the true question was only "whether the ministry should suffer themselves to be the dupes of a party." A very satisfactory apology and vindication, truly! For, as to his round assertion, that this is a "power which the best friends to liberty had never scrupled to exercise;" it is *gratis dictum*, untrue in itself, and, if it were true, nothing to the purpose.

Thus much, I have thought myself obliged to say, not only in support of my own freedom as a man, but likewise in honour of the ministry, who must, I think, be highly displeased with the over-weening presumption of an Attorney, in advancing out of doors what no minister, nor even the Attorney General himself would venture to assert within doors.

As to what he has said with regard to the insignificance of the mere resolution of the house of Commons, I do recollect that something of a like sort, was flung out by one learned gentleman, who, indeed, closed the whole of his argument on this point, by saying, that "had he the honour of presiding in any court of law, he should regard such a resolution no more than he would that of so many drunken porters in Covent Garden." It would not, perhaps be "a judicial determination of the law, which might be pleaded in a court of judicature, and would only be a declaration of the sense of the law,"

“ law,” by all the commons of England. And, without doubt, if the resolution of one house would be of no weight with this gentleman, the resolutions of both houses would be of none. Nothing but the concurrence of King, Lords and Commons will do for him. And yet, I dare say, he would be confoundedly frightened with a single vote of either house, should he live to experience it. I will not say, that the two houses have ever gone so far as to *make* law, altho’, I believe, they have gone so far as to make a King; but this, I am sure of, that they have very often *declared* what the law was, in very great points, and this is all that was contended for. In times more remote, when houses of Commons were not so scrupulous, they have frequently come to resolutions declaratory of the law; as any one may see, by reading an account of their proceedings in the reign of Charles the First, when headed by Sir Edward Coke, Selden, Glanville, and the great lawyers of those days: and this right they continued to claim and to exercise when Mr. Somers, Serjeant Maynard, Sir William Jones, Sir Francis Winnington and other lawyers, undertook to conduct them prior to the Revolution, which last transaction, altho’ wearing away very fast in remembrance, is a period of history not yet absolutely forgotten. At that time, some of the men I have named were thought to understand the constitution; they had lived in ticklish times and studied it closely: nevertheless, I do not in this respect, mean to compare them with the respectable person I have just now alluded to, altho’ they had certainly attended the house much more than he has done:

In those times it was the notion that, upon any illegal arrest, or other violation, by a great Minister, of a member of their house, it was necessary to come to a resolution forthwith, concerning the law upon that head, without waiting for the slow, and possibly ineffectual, proceedings of a Court of Justice, where a mere mistake, in the manner of pleading, might delay for a year, or possibly frustrate intirely the suit. The parliament was indeed, I know, anciently called, *commune consilium regni*, *communis reipublicæ sponsio*. And I cannot even yet regard a resolution of the Commons, in the same light with the Attorney, as “ a mere amusement;” because, if by virtue of any resolution of theirs, whether the same may be pleaded if

a regular plea or not, a man be committed to Newgate, the Court of *King's Bench* will never venture to question the legality of the proceeding. When the Honourable Alexander Murray was so committed, a late great patriot, Sir John Philipps, put on his gown, and came into the court on purpose "to make a motion," as he phrased it, "in the cause of liberty," and prayed a Habeas Corpus for the said Mr. Murray; which was accordingly granted of course. The cause of his imprisonment, returned by the goaler, was only an order of the House of Commons, without any crime alledged. The Judges said they could not question the authority of that house, or demand the cause of their commitment, or judge the same; and therefore refused to discharge the prisoner, maugre all the patriot's arguments to the contrary, and so remanded him. Nay, I will mention to the Attorney one other case, which will be worth his considering, before he slights the notice of a resolution of the Commons. In the year 1689, one Topham, the Serjeant of the House, complained that, being served with several actions, for taking persons into custody by *order* of the House, his pleas of their order in his justification, had been over-ruled in the *King's Bench*. The Commons thereupon resolved, "That
 " the said different judgments, given in the *King's*
 " Bench against the said Topham, are illegal, and a vio-
 " lation of the privileges of parliament, and pernicious
 " to the rights of parliament; and that a bill be brought
 " in to reverse the said judgments;" and they ordered that those of the Judges who were living should attend; which they did. Sir Francis Pemberton, (who had been the Chief Justice) being desired to give his reasons for over-ruling the Plea of the *order* of that House, replied,
 " That he knew little of the case, it was so long since,
 " But that in case the defendant should plead he did arrest
 " the plaintiff by order of this House, and should plead
 " That to the jurisdiction of the *King's Bench*, he
 " thought, with submission, he could satisfy the House
 " that such a Plea ought to be over-ruled: and that he
 " took the law to be so clearly." He then withdrew; and Sir Thomas Jones (a puisne Judge) being examined, said, " That it was long since, and, not knowing what
 " he was to attend upon, could give no account thereof:
 " but, that if any such judgment was given, he hoped it
 " was

“ was according to law, as the matter was *pleaded* ;” and then withdrew. Sir F. Pemberton was again called, and his reasons being demanded for his general assertion before-said ; he desired time to answer, both to the whole together, and the particular case of Jay and Topham. But an immediate answer being insisted on, he said, “ That what he spoke was *quoad hoc* to that case ; however, he gave what he had said, for his present thoughts and reason.” Being withdrawn, the House resolved, after a debate, “ That the *orders* and *proceedings* of this House, being *pleaded* to the jurisdiction of the court of King’s Bench, ought not to be over-ruled.” They then ordered these two Judges to attend again on another day ; when they were severally examined, touching their reasons for over-ruling the plea of Serjeant Topham to the action brought against him by Jay, and ordered into custody of the Serjeant at arms.

The Attorney, however adds, that even the Resolution contended for would have been of no utility, because it might have been easily evaded ; and then states two or three cunning devices as “ evasions, which he conceives “ would frustrate the resolution, and consequently render “ it, in effect, no security at all.” A change of a word only in the “ form, he says, would subject us to the same “ evil.” To evince this, he supposes a Secretary of State “ was to grant a *particular* warrant, describing the person, for the seizing the papers ; and a *general* warrant “ for apprehending the authors, printers and publishers :” and, thereupon, says, “ he should be glad to know whether either of these warrants would fall under this resolution ;” and then, taking advantage of the ground he has got, rises in his demands, and ventures to ask, “ Whether, if the words treasonable practices were inserted “ (and endeavouring to excite to treason, he should suspect to be a treasonable practice) a General Warrant “ might not, in that case, pass uncensured, including “ both persons and papers ?” Now, I will fairly tell him my thoughts of the matter, and the probable consequences had such a resolution as that contended for been come to.

I take it to be most clear, as the law now stands, a General Warrant is good in no case whatever, for the apprehension of persons or papers, or both ; and that a Particular, or any Warrant, for seizing the papers, is likewise,

likewise, as the law now stands, good in no case whatever: and consequently, that none of all his ingenious contrivances before stated, for eluding the law, would be, if attempted, worth one single straw. Having laid this down, I shall proceed to say, that, in my poor opinion, if the resolution had been agreed to, as it arose out of a particular case complained of, it would have looked to the world as if either house of parliament, whenever in any particular instance this great privilege of a freeman, the liberty of his person, were violated in the person of one of their own members, and came to their knowledge, they would take immediate notice of it on purpose to express their indignation against the outrage, in order to deter all men from doing the like for the future, and to keep fresh, in every bodies minds, the law upon that head. Their declaration in this case, where no doubt of the law itself could be pretended, would have convinced all mankind that, where ever the law was clear, they would not suffer it to be violated by any person, ever so high, or ever so great, without their immediate inquiry, and the fixing of an indelible brand for so dangerous an offence. Posterity would have seen in the journals, by the very case before the house, that the resolution was adapted to it, neither falling short of, nor going beyond it; and from thence too would all men judge how unadvisable it must be for any man, to infringe the liberty of the subject in any one point. From this instance they would naturally reason to others. Therefore, hardy as the Attorney is, I believe that, after such a resolution, he would not venture, on any quirk grounded in the change of a word, to have attempted aught against the spirit or words of the resolution, by the seizure of any member, or indeed, of any man; or, if he did, that the vengeance of the House, which he had so trifled with, would have swiftly pursued, overtaken and punished him. The Commons of England would not, in a great constitutional point, between Ministers of the Crown and Representatives of the people, endure that kind of quibbling which is tolerated between mere private parties in disputes of between *meum* & *tuum*, in ordinary causes, in courts below.

The Attorney, indeed, soon after advances a very comfortable piece of news, which is, that “ the question of
“ the legality of the warrant in question has been de-
“ cided

“ cided in a court of judicature.” I hope he is right in his information, and am very glad to hear it, but cannot help saying, that I never have heard so much before; altho’ I think somebody did once tell me that in a *trial at nisi prius*, where this and another point were in question, the Chief Justice of the Common Pleas did deliver his *own* sentiments about the warrant itself. But this cannot possibly be what the Attorney alludes to, as it was only the *dictum* of one Judge at *nisi prius*, where this too was not the only point, but mingled in fact with others; and where no *judgment* has been given upon the verdict, by reason of the bill of Exceptions: which therefore is nothing, cannot hereafter be cited in argument as an adjudged case, and by no means comes up to an *actual decision of a court of judicature*; as, That always implies, that the point of law was solemnly argued upon a stated question, before one of the supreme courts of law, that is, a bench of Judges, and by them deliberately determined and adjudged.

As to the allegation of its being “ in the power of any “ one of the parties acting *under* that warrant, to have “ brought it into issue at his option;” what is that to the party injured and acted upon, if he had it not in his power to have done so?

But without entering into all the obliquities of chicane, which may be practised to delay for two years together, if not entirely to prevent, any determination; there are many people who will never believe, that for such a reason alone, any House of Commons, in an essential point of liberty, touching one of their own members, would wait, especially in a clear case where the law was not doubtful, to see what might or might not be done in any inferior court, but would immediately come to a strong resolution in behalf of the subject at large, that should in their printed votes pervade the whole kingdom; and not leave any country gentleman or other unlearned man, in a future case of a like sort, to send for information to some practitioner of the law, before he could tell what to do in the matter.

Where the birthright and immemorial franchise of the subject has been broken, why should not the Commons, when assembled, come to a resolution; after a complaint made to them, the fact apparent, the law certain? Would it

It not have been constitutional? Would it not have been satisfactory? When it was directly advanced, that it would be an insult on the understanding of mankind to pretend that the usage of a political office could overturn or suspend the law of the land; did any one man attempt to gainsay or contradict the position? And if, a recent determination at law by any Judge had been upon the point; is it not an additional reason for the House not hesitating about a damnatory resolution? Or, if as was before urged, perhaps a little inconsistently, the point by some means or other, was still hanging undecided in the courts below; was it not so much the more necessary for the parliament to prevent any suspense thereby in people's minds, about their clear birthright? Nay, as every body knows that the present House of Commons is independent, whatever others may have been; will not the reception, the discussion by the longest debate in the journals of parliament, and the subsequent suspense and indecision of the point, make men who had no doubt before, begin to doubt a little now? What should make a free, constitutional and independent part of the legislature, when appealed to by one of its own member's, (I may say fled to, as an asylum from the violence of those pretending the authority of the crown,) refuse to come to a decisive resolution in favour of their own and every other Englishman's boasted inheritance? May not this create a doubt in many a sensible man's mind where there was none before? If the times had been arbitrary, men might have thought the crown perhaps had interposed, and that the Commons were therefore afraid to persist in the assertion even of their known rights. But there not being the least ground now for such a surmise, it will make many men at a loss how to account for the parliament's taking up the matter, considering it, and then coming to no resolution at all, but adjourning it *smè die*. The point was so great, that never were the eyes of mankind more fixed upon their representatives. Indeed, I never saw more stir in the House itself, every body pressing his friend to stay and vote; the Secretaries of the Treasury, and other men of consequence, were remarkably active; and every thing wore the face of a decisive day. Why, after all, no resolution was come to, I never could learn. I am sure what has been urged without doors has not the least semblance of reason or constitution

constitution. Indeed, in all my reading of past times, I have never met with any like it. On such points, the Commons ever used to proceed to a strong resolution. What therefore influenced the Ministers on that day, I cannot guess, unless it be what I dare not name. The common report is, that they carried their point, in coming to no resolution, but by fourteen; that during the debate, they were apprehensive the majority would be against them; that many of their very best friends voted, and some even spoke against them; that some sons left their fathers, and others with difficulty went out of town; that many members, who had not attended the whole session before, came down, some from sick-beds, others from foreign parts; and yet, after all, altho' the House sat two days on the matter, the first day from three in the afternoon through the whole night, till near seven the next morning, and the other day till half an hour after five in the morning, the deciding reasons against coming to the resolution proposed, prevailed only by a majority of fourteen. The crowd and agitation of people about the House was inexpressible; substantial old citizens, who could not sleep from concern, stopped members as they passed in their chairs, to know the event; in short, the face of mankind could not shew more distress, if the constitution had been actually giving up to a Stuart, in one of its most essential and vital parts, by a Tory and passively obedient parliament. And why all this? I am curious to know; I must again from my heart declare, and I conjure, therefore, those who do know, to give the public their reasons for the same.

What "necessity of peculiar circumstances," the Attorney may think there should be "absolutely to require their interposition," I know not: but I should imagine these few circumstances would be fully sufficient; namely, that the act complained of was committed in time of public tranquillity, without a colour of law, by a King's minister, upon one of the representatives of the people, in a free country, on a charge of the most disputable of all crimes, which is at most but a misdemeanor; when too, however apparently libellous the words might seem without doors, *perhaps* (to borrow a common word with the Attorney) no man would say, they would have been deemed libellous, had they been uttered by any member in his

place within doors, since the memorable case of *The Five Members*.

Moreover, to return to the resolution proposed, where a practice has obtained in a high office, which is clearly contrary to law, and it is a matter that nearly affects the personal privilege of every freeman, it seems to me that the very thing which a House of Commons would naturally do, is, to come to a resolution damning that practice, and to go no farther; for to bring in a bill upon the occasion, would look as if a new law was necessary, because prior to that the practice had been esteemed legal, or at least very dubious. The bringing in a bill would be countenancing in some measure what had been done, and look like a new regulation setting a-foot. Besides, an act of parliament newly made, is not so venerable in the eyes of the world, or so secure againk future alterations, as the Old Common Law of the Land, which has been from time immemorial the inheritance of every Englishman, and is, on account of its antiquity, held, as it were, sacred in every man's mind.

If a matter of constitutional concern and alarm be stirred in the House, and the Members do not seem clear about the law, it is natural and usual for the House to go into, or appoint a Committee, for the purpose of looking into precedents, to see how the House has acted in similar occasions, and what the constitution is; but, when the matter is so clear at the very first blush, that nobody has any doubts about it, one cannot readily frame to one's mind any reasons against coming to a resolution at once that may satisfy the Public. To call for cases of this having been done is unnecessary, because the nature of the thing shews it is right. Some things are so plain of themselves that no case can make them plainer. This power of interposition in the Commons flows of necessity from the nature of the government; they could not be the grand inquest of the nation, the great council of the realm, sponsors for the republic, or guardians of the rights of the people, without possessing it. To suppose that they have the power of inquiring, and that it should be proper for them so to do, and yet not come to any result, in consequence of such their inquiry, seems to be past understanding; and, where a matter is among the first principles of the constitution, it is in vain to be looking for cases.

cases to prove it, nay, such a proceeding would look as if this right could not be put in ure, unless some instance of its having been exerted were produced to warrant the exercise of it. But, indeed, there is another reason why examples need not be cited, which is, that they are so numerous, that no man can read through the times of the four Stuarts, without finding the journals of Parliament full of them.

As to the instances quoted and ridiculed by the Attorney, it seems to me that they directly apply to the main hinge of the dispute, that is, to the practice in Parliament of interfering by resolution in matters of law; nay, they go still farther in point, for they prove that the House has interfered by resolution in matters of law, where precedents and practice were cited, and admitted, in support of the malefactor; and that this had been done not only in cases of public concern, but even in a private case, where the illegal warrant itself had been issued at the desire of a father against one of his own children, upon a mere family motive. In this last case, the simple fact was this, Lord Danby fitted out a small vessel with arms, unknown to his father the Marquis of Carmarthen, Lord President of the Council, who acquainted Lord Nottingham, the Secretary of State, with it; he had not time to put this information into writing, nor was it upon oath, but wrote it, upon memory, for his own satisfaction. Lord Danby is taken up, and says, "the vessel was his own, and fitted with the arms it had before to make use of for his diversion." which the Secretary found so ingenuous an answer that he released his Lordship without bail, upon his promise on his word and honour to appear upon summons. Some of the Members, however, said, "This proceeding sticks not only on the people, but their Representatives may be in danger. If, by intreaty, a man may be taken up in this manner, every mother's son may be taken up. Natural affections must not be used to try tricks with the government. Lord Nottingham granted the warrant without oath." Howard says, "It will justify Lord Nottingham, because he had his information from a Privy-Counsellor." "I would be satisfied whether a Privy-Counsellor must not give information upon oath, as well as another? If this warrant was granted as a Privy-Counsellor, or a Justice of Peace, I know no law

“ law for it ; for, if six Privy-Counsellors do it, and here
 “ is but one, it is worthy your consideration. If as a
 “ Justice of Peace, he cannot take up a man without
 “ oath. If one Counsellor shall whisper to another, and
 “ imprison a man, I know not who can be safe. If we
 “ take up this now, at the rate elections go at, and the
 “ determination in Sir Samuel Bernardiston’s case, they
 “ may have a Parliament as they please. I know not but
 “ that it may be in the power of one great man to make
 “ a Parliament. I should be loth to go without this be-
 “ ing decided ; there would be no safety for me when I
 “ am at home. In two months this man may go round
 “ the House thus. I hope, as *Englishmen*, we shall not
 “ forget our rights ; and any man that will do this, is not
 “ fit to be employed in the government. I would not
 “ have it go off that he can warrant the thing. Prose-
 “ cution of a writ will hinder a member from his attend-
 “ ance. He said, “ the warrant is for treasonable prac-
 “ tices,” which isailable. I hear it moved to refer it to
 “ the Committee of Privileges to inquire into it ; but I
 “ think that not fit. From whom will you have informa-
 “ tions ? Will you send for Lords Nottingham and Car-
 “ marthen ? I would have a good correspondence with the
 “ Lords: the Peers will not come to you, and there will
 “ be a rupture. But if you will come up to the motion,
 “ for your honour and ease, vote the Breach of Privilege,
 “ and then address the King to take order that the like
 “ be not done for the future. Granting the warrant is a
 “ thing that must not be passed by so hastily. You will find
 “ few messengers that will deny such execution of a war-
 “ rant. The Messenger (says the Speaker) undoubtedly
 “ breaks your privilege, as well as the Bailiff that arrests
 “ your Member. The Bailiff and he that sues out the
 “ writ against a member (adds Mr. *Hawles*) are upon
 “ record ; and if you only call upon the person who does
 “ officiate, your privilege will be quickly lost. Whoever
 “ issues out the warrant, is more, or equally, guilty than
 “ he that executes it, (says old Sir John Maynard.) As
 “ this case stands, a member is imprisoned, and a warrant
 “ is made to take him for *treasonable practices* ; if we take
 “ notice of it, and let a member sit among us so accused,
 “ we cannot well answer it. We are to vote it a breach
 “ of privilege, and then inquire what those treasonable
 “ practices

“ practices are. At this rate we may all be imprisoned,
 “ and whipped to our lives end. Vote it a breach of pri-
 “ vilege, and sit not mute upon so plain a breach. (To
 “ which Sir John Thompson subjoins) He that touches
 “ the Parliament, touches the vital part of the nation.
 “ The man is not fit to be Secretary that carries about
 “ him the legislative authority to commit in this manner.
 “ The Messenger had been clapped up, if he had not done
 “ it. Put the question thus ; “ That granting the war-
 “ rant without notice, &c. was a breach of privilege,
 “ &c.” The House then resolved, That the granting
 “ a warrant to arrest the Earl of Danby, a Member of
 “ this House, and the taking him into custody by virtue
 “ of that warrant, is a breach of privilege of this House.”

The four cases are perfectly apposite to the great question of parliaments interposing by resolution, where the known law has been broken by the hand of power. And, I should think too, that if a case consists of four points, and a precedent can be found for each point, That case would be fully proved by those four precedents, according to my notion of logic. At least, a man who denies the reasoning on this head, has no right to accuse his antagonist of “ unfairness and quibbling,” as the Attorney does throughout ; and, from what I see of his performance, should therefore imagine he could only do so in order to forestall the charge, and to prevent its being applied to himself. And so far from being angry, as he is, with two of these cases for being applicable to a Chief Justice of the *King’s Bench*, I like them the better for it, and wish, that whenever a Chief is found to be clandestinely meddling in matters of state, in perversion of the law, he may be dragged into broad day-light, and his name and memory be branded for ever, to the latest posterity. I cannot, indeed, figure to myself a meaner or more pernicious person than a Chief Justice, with a great income for life, given him by the public, in order to render him independent, privately listening to every inclination of every ministry, and warping and wire-drawing the plain letter of the law, in order to accommodate it to their inclinations, instead of pursuing the course of established precedents, inviolably, intrepidly, and openly, without regard to party or person. The chapter of expediency is the very worst source of adjudication,

dication, inasmuch as it tends to the setting afloat, by degrees, the whole law of the realm.

“ In our law, the Judges are bound, by a sacred oath, to determine according to the known laws and antient customs of the realm, set down in judicial decisions and resolutions of learned, wise, and upright Judges, upon variety of particular facts and cases. To have no rule to decide controversies but the rule of equity, is to begin the world again, and to make choice of that rule, which out of mere necessity was made use of in the infancy of the state and indigency of laws. And to set up this rule, after laws are established to relieve hard cases and leave the matter at large, is it not rather unravel-ling, by unperceived degrees, the fine and close texture of the law, which has been so many hundred years making? The laws of this kingdom are not, now-a-days, to be spun out of mens brains, *pro re nata*.”

“ To allow of any man’s discretion (says Lord Coke) that sits in the seat of justice, would bring forth a monstrous confusion.” It is, indeed, wonderful that any man should have so servile a disposition; for, let his abilities be what they will, he will always be regarded as a contemptible personage. This sort of profligate magistrate may be sure of being used by every ministry, but of being esteemed by none, seeing no set of men can depend upon him any longer than they remain in office and power; his only principle of action being an implicit obedience to the old tutelar Saint at St. James’s. He must be, in truth,

A tim’rous foe, and a suspicious friend,
Dreading e’en fools.

And “ Cowardice in a Judge is but another name for Corruption.”

Since these two examples of the Commons declaring the law, even in opposition to the practice and decisions of Chief Justices, have been mentioned, I cannot forbear noticing two or three circumstances in their cases, which tally most surprisngly with some of the doctrine I have advanced, and with the cause that gave occasion to it. The committee reported several cases of restraints put upon Juries by L. C. J. Keeling; among other things, that

that, " in an indictment for murder, which the Jury
 " found manslaughter, because they found no malice pre-
 " pence, he told them they must be ruled by him in mat-
 " ter of law, and forced them to find the bill, Murder ;
 " and that the man was executed accordingly, without
 " reprieve, notwithstanding the address of the Gentlemen
 " of the Bench to him. That he forbid a Habeas Corpus,
 " and a Pluries to be issued out ; so that the party was
 " obliged to petition the King." The House thereupon
 resolved (1) " That the proceedings of the said L. C. J.
 " are *innovations* in the trial of men for their lives and
 " liberties. And that he has used an arbitrary and *illegal*
 " power, which is of dangerous consequence to the lives
 " and liberties of the people of England, and tends to
 " the introducing of an *arbitrary* government. (2) That
 " in the place of judicature, the L. C. J. has undervalued
 " vilified and contemned *Magna Charta*, the great pre-
 " server of our lives, freedom, and property." As to
 L. C. J. *Scroggs*, there was a great complaint against
 him, for his treatment and discharge of a *Middlesex*
 Grand Jury, before they had presented all their bills, for
 arbitrary proceedings in cases of *libel*, and other matters,
 and for issuing of illegal *General Warrants* for persons and
 papers. The Law-members in the House urged, that
 " if a Grand Jury be discharged whilst indictments are
 " depending, there could be no proceedings of justice.
 " The Jury was likewise blamed by the Chief Justice,
 " and told, *that they meddled with matters which concerned*
 " *them not*. In former times, Judges had one rule of
 " justice to go by, and another of policy, and if Judges
 " once undertake *that*, there is an end of all law. Shall
 " we have law when they please to let us, and when
 " they do not please shall we have none? It is assuming a
 " legislative power, by which a Judge makes his will a
 " law. *Do as you have done already in this Parliament,*
 " *make a vote upon them*. If you do not deeply resent
 " this, all your laws will signify nothing to posterity ;
 " for all is at stake, if men take upon them to proceed so
 " arbitrarily, and are so servile as to violate laws for self-
 " ends. I will not define the offence, but, I think,
 " these proceedings do subvert the fundamental laws, and
 " so I would go to the utmost severity of judgment.
 " The first violation of *Magna Charta*, was from the
 " two

“ two Chief Justices *Trefilian* and *Belknap*, and these
 “ Judges have now taken upon them to subvert the
 “ rights and privileges of the subject. *My opinion is to*
 “ *make the question before the House general.* In *Scotland*
 “ they have what laws their governors please to impose
 “ upon them; let us take care that our condition be not
 “ brought to that. I would gladly know what way there
 “ is to bring a great criminal to punishment but in Parliar-
 “ ment (and we have little hopes there, by what I have
 “ seen) if ever you admit Judges to let Juries, or not,
 “ inquire into offences, as they please. I think I can re-
 “ member a precedent, when the Judges took upon them
 “ to violate the laws, and so did violate the King’s oath
 “ and their own, and were hanged for their pains; and
 “ I shall make no great scruple to do it again. Printing I
 “ take now to be free. A subject hath, by law, liberty
 “ to write, speak, or print; he may be indicted, if he
 “ transgress, and it is at his peril, if he offends. Shall
 “ not a man speak, unless he be licensed. The Court of
 “ *King’s Bench* was at *Scrogg’s* direction. But, if
 “ Judges can be found to make new laws by their inter-
 “ pretation of the old ones; and if *Treasurers* can be
 “ found, &c.” “ A Committee was appointed to exa-
 “ mine the proceedings of the Judges in Westminster-
 “ hall, and to report the same, with their opinions there-
 “ in, to the House.” Upon the report of the Com-
 “ mittee, “ the House resolved, *nemine contradicente*, That
 “ the discharging of the Grand Jury by the Court of
 “ *King’s Bench*, before the last day of the Term, and before
 “ they had finished their presentments, was arbitrary and
 “ illegal, destructive of public justice, a manifest violation
 “ of the oaths of the Judges of that Court, and a means
 “ to subvert the fundamental laws of this kingdom: That
 “ it is the opinion of this House, that the Rule made by
 “ the Court of *King’s Bench* against printing of a book,
 “ called, *The Weekly Pacquet of Advice from Rome*, is
 “ illegal and arbitrary, thereby usurping to themselves
 “ legislative power: That the Court of *King’s Bench*,
 “ in the imposition of fines on offenders, of late years,
 “ have acted arbitrarily, illegal and partially: That the
 “ refusing sufficient bail in these cases, wherein the
 “ persons committed wereailable by law, was illegal,
 “ and a high breach of the liberties of the subject; and
 “ That

" That the warrants * issued by the King's Bench are arbitrary and illegal. And it was ordered, That the said report, and the several resolutions of the House thereupon, be printed ; and that Mr. Speaker take care in the printing thereof apart from this day's other votes." Thus did the Commons behave in the case of two Chief Justices of the *King's Bench*, and their conduct is so decisive upon the point we now are, that no words can add to the force of it. But there was another thing, which was done in the same session, that I cannot help relating. The Under Secretary of State, by direction of Sir Lionel Jenkins, Secretary of State, who had received a verbal order from the Clerk of the Council for the purpose, writes a letter to a gentleman at Dover, desiring him to wait upon the Mayor, and direct him to seize a Man, if he should land there, together with his companions, and detain them until further directions ; and in this letter there is inclosed a particular description of the Man, and his name said to be Norris or Morris. The information upon which this letter or order proceeded, was not upon oath. However, when Norris landed, he is taken and carried before the Mayor, who thought it reasonable to commit him to the common prison, and to seize his papers. When that was done and known, there were two orders of Council

* " Angl. ff. Whereas there are divers ill-disposed persons, who do daily print and publish many seditious and treasonable books and pamphlets, endeavouring thereby to dispose the minds of his Majesty's subjects to sedition and rebellion : And also infamous libels, reflecting upon particular persons, to the great scandal of his Majesty's government. For suppressing whereof, his Majesty has lately issued his royal proclamation : And for the more speedy suppressing the said seditious books, libels and pamphlets, and to the end that the Authors and Publishers thereof may be brought to their punishment :

" These are to will and require you, and in his Majesty's name, to charge and command you, and every of you, upon sight hereof, to be aiding and assisting to Robert Stephens, Messenger of the Press, in the seizing on all such books and pamphlets as aforesaid, as he shall be informed of, in any Book-sellers or Printers shops or warehouses, or elsewhere whatsoever, to the end they may be disposed as to Law shall appertain. Also, if you shall be informed of the Authors, Printers, or Publishers of such books or pamphlets, as are above mentioned, you are to apprehend them, and have them before one of his Majesty's Justices of the Peace, to be proceeded against according to law. Dated this 29th of November, 1679.

To Robert Stephens, Messenger of the Press ; and to all Mayors, Sheriffs, Bailiffs, Constables, and all other Officers and Ministers whom these may concern,

W. Scroggs.

to the Mayor to stop and deliver him to a Messenger, who is sent down on purpose to bring him before the Council, in custody ; and the papers are ordered to be lodged in the council chest. Norris, after being examined, was dismissed, and it was declared there was no farther cause of detaining him ; and the verbal order first mentioned was never entered in the minute-book of the Council. Upon this case, a complaint is made to the House of Commons, who immediately appoint a Committee to inquire into and report the matter to the House, which is done accordingly. The Members enter warmly into the grievance, and some of them say, “ I would know how the Privy-Council
“ came to have a description of this man. It may be,
“ the French Ambassador has had some influence in
“ Councils. I do not know what stopping a man on the
“ way or road is, to be immediately sent up to the Coun-
“ cil by a Mayor or Officer, upon verbal order. I know
“ nothing of a verbal order of Council ! *In cases of neces-*
“ *sity to commit illegal actions*—these are strange assertions
“ for what have been done, or what may be done. The
“ Thing is all of a piece, for some great persons are con-
“ cerned in it. Let Gentlemen make it their own case.
“ I see not who is to blame, but he that signs the war-
“ rant ; nothing appears to you else, therefore put a
“ brand upon it. A parcel of men there is, who abuse
“ the King, and still you must be tender of them, and
“ these men must still be about the King.” Thereupon,
Sir Lionel Jenkins very honourably took on himself the
letter written by his Under Secretary, and said, in excuse
of himself, that he was but ministerial in the affair, owned
he had the information from a man who had it from ano-
ther, and that he related it to the Council as he thought it
his duty ; that he had thereupon a verbal order to seize the
person informed of, and, in consequence of that, gave di-
rection to his Under Secretary to write the letter before-
mentioned, and if any thing had been done unjustifiable,
that he himself must answer it ; that he thought it was
treason for a Romish Priest to be upon English ground,
and felony in Norris to receive him ; and that, in his post,
he could do no other than obey his superiors ; and that he
humbly took leave to aver, that a verbal order in a Com-
mittee of Council, is what is not entered into the minutes
of the Council. The House desired Sir Lionel to with-
draw,

draw, which he accordingly did, and then they resolved, " That the late imprisonment of Peter Norris, at Dover, " was illegal ; and that the proceeding of Sir Lionel Jenkins, Knight, one of the principal Secretaries of State, " by describing the person of the said Norris, and directing such his imprisonment, was illegal and arbitrary ; " and they made an order for printing the case of Peter Norris at large, which was likewise done. Now, here the Commons, without any communication with the Lords, resolved a point of law, altho' Norris *might have brought an action* of false imprisonment, had the opinion of a court of law, and recovered *damages* for a satisfaction of his injury ; and he was no member of their house. This resolution too, was not made as a foundation for any future bill, nor for articles of impeachment, but merely to damn an illegal and grievous warrant.

Such hath been the conduct and interposition of the Commons under the house of Stuart, both father and son, with respect to the law of this kingdom, when invaded by great officers of state ; and yet these were Princes who claimed a right of governing the kingdom, paramount the laws, *jure divino* ; whereas it is the honour of his present Majesty's family to derive their sole title from the choice of the people, from an *English* act of parliament. There is not, therefore, the least divinity that can now be possibly imparted from the throne to any of the present ministry ; they are mere men and creatures of civil polity, and their actions may be judged by the common law of the land, without either blasphemy, or any extraordinary or occasional statute for the purpose.

This being so, I am amazed that the Attorney should think a bill necessary ; because, if there be no law now existing, that authorizes General Warrants in any case whatever, it really seems to be ridiculous to bring in a bill " to regulate what does not exist ; " an argument, I find, which he affects not to comprehend, merely because he is unable to answer it. " The Evil " is the practice or usage which has grown of late, within the time of our fathers, in a clandestine office, contrary to the fundamental law of the land ; and when this practice has been detected, the parliament need only damn it, and leave the law as it was, without " the alteration even of an iota in " matter or form." The Attorney, by an act of parliament,

liament, would, I perceive, vain make law of this modern usage, under a pretence of bettering thereby the old common law ; but, I fancy, he will find most people of opinion against him, and as much afraid of his coarse hands as of his superiors refinements, and, therefore, beg to have the law remain as it is. No act could possibly answer the end of a resolution, unless it were, perhaps, a short declaratory statute of three lines, reciting that, “ Whereas
 “ a novel practice, had of late years gained footing in
 “ several ministerial offices, whereby General Warrants
 “ for the apprehension of persons under a general description, without naming any in certain, had been issued
 “ from such offices contrary to *Magna Charta* so repeatedly confirmed, and to the immemorial and established rights of every Freeman, and to the known
 “ laws of the realm ; Therefore, by the direction and
 “ consent of King, Lords and Commons, be it declared, That such practice is in all cases illegal, repugnant to the fundamental principles of the constitution, dangerous to the liberties of the subject, and
 “ absolutely unwarrantable.”

Old Sir Edward Coke said, with some humour, in Charles the First's reign, at the head of the Commons in their conference with the Lords——“ For a Freeman to
 “ be tenant at will of his liberty ! I will never agree to
 “ it : it is a tenure not to be found in all *Littleton*.” “ It
 “ is (as he says, in one of his treatises) a great deal better
 “ for the state, that a particular offender should go unpunished, on the one hand, or that a private person, or
 “ public minister, should be damnified on the other by
 “ the rigour of the law, than that a general rule of law
 “ should be broken to the general trouble and prejudice
 “ of many.” Therefore, I beg leave to enter my protest against any bill to regulate what I hope will never exist. The ancient Britons in a body, told Augustine himself, *se non posse absq; suorum consensu & licentia prisciis abdicare moribus*. And, as to his present Majesty, one may say, in the words of the famous Serjeant Glanville, (since I am in the humour of quoting) “ There is no fear
 “ of trusting him with any thing, but ill counsel against
 “ the subject ;” for, when once he is truly informed what his people's *prisci mores* or Common law is, he will
 never

never countenance any officer in abdicating them *absq; consensu et licentia suorum.*

I can assure the Attorney, that I have, according to his directions, "seriously attended to his arguments." However, I very much doubt, whether the Ministry will pardon him for obtruding his private reasons as those which weighed with them, to put off the determination of the question. Indeed, if any of the arguments he has adduced on this head, were really of weight with them, I should think it must be that which he grounds on the impracticability of *pleading* with effect such a resolution in any of the courts of judicature; for I sincerely esteem this to be by far the most satisfactory of all. I know, my Lord Coke does say very emphatically, that *the science of beau pleader is the very heart-string of the law.* It would therefore, I confess, be a lamentable thing to have the Crown-pleaders "*divided and confounded*", in this their nice and artificial department of the law. Considering the present knotty difficulties attending these gentlemen, to throw any additional rub or stumbling block in their way, would be unpardonable in any good-humoured administration. I do not, however, pretend to form a determinate judgment of the ministry's reasons for avoiding a resolution, as I have not vanity enough to suppose I can fathom them. *Perhaps*, they might be somewhat pressed in time, having other weighty affairs in hand, that the vulgar know nothing of, and therefore would not come to any decision of the point, seeing they could not give it the parade of a solemn discussion upon the report of a committee; or, they might oppose the resolution, because it was moved by the opposition, resolving withall to resume it themselves the very next session, which last, indeed, I am very apt to think *may* be the case; or, peradventure, there might be other less ostensible and more predominant reasons for their having so notoriously exerted the utmost of their strength, merely to avoid the coming to any resolution at all. They said nothing inconsistent with any conduct; and, as many of their best friends voted against them, it cannot be supposed they would run so much risk, without some very extraordinary reasons for so doing. It would not, however, be disagreeable to the public, to know from the pen of a minister, especially, from one of them that declines no labour,
and

and has been a practising lawyer himself, what really were the arguments that swayed him to be for an absolute adjournment of this question; when so many people were of opinion it would have been more for his interest to have taken the popular side, and agreed to the resolution, if not as first moved, at least, as finally amended, narrowed and particularized by his learned co-adjutors. Such information would be much more acceptable than the little scraps of politics and intelligence, which one now and then finds in the *Daily Gazetteer*, and which the common reader, upon the very first view, attributes to Jemmy Twitcher, (or his second, Dr. Shebbeare,) who, I presume, is not of the House of Commons, and is perhaps some man that is too much unacquainted with law, and of too little gravity to be equal to such a performance, and therefore, contents himself with doing business in another way, and only now and then writes off a squib, *upon his knee*, for one of the daily papers, as any matter happens to strike him, at home, in the coffee-house, or at the tavern; in company with his wife and family; his mistress and girls of the town, with ministers of state, gentlemen of fun, bawdry and blasphemy, or singers of catches. Altho', I know it is the opinion of some people, that any thing will do for the public (poor John Trot.)

The Attorney seems to think, he has so sufficiently defended the Majority, that he may swagger a little, and therefore asks, Is this all that you have to complain of? I really thought you could have made out a more moving tale? What is capable of moving him, I know not; but I can assure him, that people in general, think the plain story so bad, it is not well capable of being exceeded: and, all he has convinced me of, is, that there is nothing so bad, but some man or other, for the present penny, may be found hardy enough to undertake either the execution or the defence of. When I hear a man call an actual arrest of a member of parliament, on the mere charge of a libel *ex officio*, and the seizure of his papers, "a phantom of imagination;" and remember to have heard the same man declare at his outset upon this question to a very great assembly, "that he had long been a member of it, but had rarely attended, because he did not think it *worth* his while before, having more valuable business elsewhere;" and recollect scarcely ever to have seen him

him in that assembly, or at least to take any part in it, except when the confirmation of "another pillar of the constitution, the Habeas Corpus law," was in agitation, by virtue of a *bill* too (the mode that he now seems fond of) and that he then gave an earnest of his patriotism by being the champion of the opposition to it, insomuch, that he roused the indignation of the Great Man of the age (then a minister) who could not forbear starting up and reading to him, upon the spot, the resolutions of the ever-memorable parliament of Charles the First, on behalf of the rights and liberties of Englishmen, being therein supported with great eloquence and strength of argument by the then Attorney General, another great lawyer, and a particular friend of this last gentleman's, having indeed been the occasion of the bill: when all this, I say, presents itself to my mind, I want nothing more for forming a decisive opinion of the Attorney as a public man. By calling him the Champion, I do not mean to forget, that a certain candid lawyer united his best endeavours to strangle this Habeas Corpus bill; but then, he did it in so delicate and qualified a manner, that surely he cannot expect to have *his* pass for a first-rate part upon the occasion; no more than on another, when he gave up (from complaisance, I presume) an opinion that he had drawn and signed relative to a prosecution, and submitted to concur in that of an over-bearing colleague, who, tho' a subordinate co-adjutor in rank, by the boldness of his temper, took the lead in the matter.

I cannot help here remarking, that ticklish times or political struggles, always bring to light the real abilities of men, and let one see whether a man owes his reputation and rank to family, learning, and an attention to please, or to real great parts, a sound judgment, and true noble spirit. People of the latter class, become for ever more considerable by opposition; whereas the former by degrees sink to common men in it, and should therefore never quit for one moment a court, or, if by connection and chance they are obliged so to do, should return to it again as fast as they can.

Being one of those men, who think that "The heart-blood of the commonwealth receives life from the privilege of the House of Commons," that is, in all matters where a dispute is likely to lie between the crown and

and the people, I cannot help noticing any the least incident, that seems to me to break in upon it at all, and endeavouring from the conduct of men, even in such little matters, to find out a clue that may unravel their disposition in concerns of much greater moment, not judging of politicians in the least, from the professions they make, but from their actions, as the genuine expositor of their soul. I have likewise remarked, that universal civility and a smiling countenance, do not necessarily imply friendship and sincerity, or candid discourse a real disinterestedness. And no Doctor, however learned in civil life or the morals of Epicurus, shall negotiate me into another opinion. But, by privilege of parliament, I do not mean that shameful exemption from private arrests, which seems to me to operate against liberty intirely, and to render a House of Commons no other than an asylum for needy debtors ; who, you may be sure, when once they are elected, like all other people in worldly distress, both will and must do any thing for ready pay ; and, altho' one of this description may be ashamed to look mankind in general in the face, yet upon any call of a pushed minister, he will contrive to skulk down to the Lobby ; and be sure so to dispose of himself, as to be able to come forth, whenever the division takes place, and then ; perhaps, disappear till a second call of consequence shall render his appearance of some worth again. I speak alone in support of privilege against the power of the crown. Now, I remember being in company not long ago with some lawyers, who were talking over some late events relative to Mr. Wilkes, and one of them was saying that there was no doubt about the proceeding in this respect, occasioned by Mr. Wilkes's having a design to lay hold of the first moment for stirring a complaint of a breach of privilege in his own person, and the Chancellor of the Exchequer's having likewise a message from the King to communicate to the House concerning privilege ; a great commoner immediately said, " this matter can admit of no dispute, and I " fancy I don't hear well ; the existence of the freedom " of a House of Commons depends upon privilege : a " message from the King of a breach of Privilege ! " Strange words ! It cannot be so ; it may be of some ; " what relating to Privilege." A Gentleman in the company thereupon bethought himself of saying it was usual, in

in order to give a certain commencement to a session, to read a bill; and that for this reason, the Clerk always prepared one accordingly. This gave room for a complaisant lawyer immediately to throw in, that this was certainly necessary, as all acts of parliament, having no certain day named therein, were in force from the beginning of the Session, and that my Lord Coke had said so. The respect of us all for this conciliating Gentleman's opinion, at that time, made us acquiesce in what he said. However, I then thought it a very strange reason, and since, upon inquiry, find there is no foundation for it, altho', I suppose the candid gentleman really thought there was, when he said so, and that he did not drop such words in a free company like ours, merely with an intention of having them reported to his advantage in one particular place. But, if he did, as it was a mixed company, and no secrecy necessary, I have a right to tell the world the story; and yet I wish, with all my heart, that his civility may not be thrown away, nor the courtliness of his disposition long lie unheeded. As to the thing itself, it must strike any plain man that the beginning of a session becomes as certain and notorious from the King's coming to the House, sending for his Commons, and his speech, which all appear in the printed proceedings of the Commons, with the day prefixed in latin, as it is possible. This is something real; whereas the bill prepared by the clerk is nothing, for it is never passed into an act, nor heard of afterwards; and it is only made use of as a mere type or symbol, to keep alive the right which the Commons claim of going upon their own business before they go upon that which is pointed out to them by the King in his speech, having in fact generally none of their own that is ready time enough for the purpose. Now, nothing in the world could have been a stronger proof of the exercise of this right, than the giving a preference to the complaint of their own member to a message from the Crown; whereas, nothing could seemingly invalidate this right more than the proceeding upon the royal matter before that of their member, and especially, if there should be not only a doubt, but a certainty, that his was first moved. Upon the principle that privilege is to take place of every thing else, nothing is of so much consequence to the community, as the relief of its representatives, from an unjust violence; they cannot

do their duty as a parliament without it; for the parliament cannot be free, every county, city and borough cannot have its deputy present without it; and for this reason one would imagine this should be their first business, which being printed and appearing in the votes, would render the commencement of the session as remarkable and certain, as the reading of any bill whatever. With respect to my Lord Coke, I have a notion he says only, that "when a parliament is called and does not sit, and is dissolved without any act of parliament passed or judgment given, it is no session of parliament, but a convention;" wherein is not one word touching the necessity of reading a bill to give a certain commencement to a session, and, indeed, I think he could never say so silly a thing; for I do not see how That marks a commencement more than any motion made or resolution come to; and if the passage above quoted be what is meant, it is of a case which does not at all apply to the present question, because it supposes a case where no act at all is passed or judgment given; and no man on this side of St. George's channel thinks of inquiring after the commencement of an act that never existed, as a matter necessary for the courts of justice to know. Moreover, the title of all acts printed, expresses the time of the commencement of the session when they passed. But, I have frequently remarked, that where a desire of pleasing others, operates more strongly than the desire of doing what is right, men even of decency and circumspection will slip into strange absurdities now and then. They will betray the true bottom of their conduct, when they least intend it. No training or education will enable a little mind intirely to hide its littleness from the eye of an attentive observer.

In short, a man may advance such a position, by way of compliment, altho' it be somewhat at the expence of his understanding or his sincerity; and it would not be worthy any serious attention, were it not a little characteristic, not only of the person, but of the times, when such things can pass for reasons. Too much respect cannot be shewn to the Crown by any man as an individual; but, it ill suits with the duty of representatives of the people to be swayed, by any motives of personal respect, to part with a jot of their own independency and dignity in
their

their corporate capacity. In truth, I suppose, no instance of the kind ever happened in our House of Commons, or ever will. I do not, however, mean to say, that men who advance such doctrines may not be of use about a Court ; but, being formed in a prerogative mould, they can never be brought to act fairly by the people, let the ground be ever so good ; for they cannot find in their hearts to speak what may be capable of the least interpretation to their disadvantage, and every now and then will drop such expressions of candor and moderation, and so qualify what they say, for the sake of being civilly reported elsewhere, that they enervate all opposition, and by their suppleness frequently lose some great point of liberty, that might otherwise be obtained for the public. Being an old fellow, and recalling to mind the other guise spirits that struggled first for an exclusion bill, and when that proved impracticable, still went on, and, at last, brought about the glorious revolution ; I fancy I hear old Britannia call out to these tame, temporizing spirits, these scholars of mere worldly caution and oeconomy, these Hanoverian Tories : You do me more harm than good upon every real trial ; your parts are not extraordinary, nor your learning singular ; your speech is long, but neither forcible or persuasive, and you have not a grain of true patriotic resolution : “ Law in such mouths is, in fact, like a sword in the hand of a lady, the sword *may* be there, but, when it comes to cut, it is perfectly awkward and useless ;” depart in peace, leave me to myself, and, return from whence you came ; I never asked your assistance, and had been better without it,

*Non tali auxilio, nec defensoribus istis
Tempus eget.*

A man may in truth, write moderately and meritoriously, in behalf of the government, enforcing new laws of forfeiture on the subject, who never will, no more than any of his name, summon up spirit enough to speak plainly and boldly, at the hazard of his interest, let liberty in general be ever so much concerned, or his own fortune be ever so great, and his expectancies ever so vast.

There is of late such a lack of what are called public men, that I am persuaded there are many gentlemen who would deem Locke on government a libel, were it now

published for the first time, instead of being reprinted. The Tory doctrines seem to be establishing themselves every day ; and Tories spring up every hour, like toadstools in the root of an old oak, that is sprinkled by accident with a little water. I remember to have heard a Scotch Lord, who piques himself too upon law, and who had a brother that was high in the profession, declare, before a great assembly, that His Majesty held his crown as free as any of his ancestors ; for every body knew that the laws passed at the revolution, were the acts of heat and violence, and party, and to be regarded accordingly. Whereas, if these acts were once set aside, and those passed in consequence of them, His Majesty would have no title at all to the throne that he now fills, so much for the benefit of us all. I really shall not wonder in a little time, to hear hereditary right talked of again. and then it is but one step more to the old doctrine of *jus divinum*, and passive obedience. Now, I chuse to have his Majesty's throne remain fixed upon its only solid or durable foundation, an act of parliament. I desire to steer through the temperate and easy channel of a legal constitution, and a limited monarchy ; without being demolished on one side by arbitrary prerogative, or perpetually agitated on the other by the tumult and faction of a popular and republican state. I am jealous I confess, of all innovations, and heartily wish the present constitution may last ; without going so far as a late great financier, who is reported in his very last moments to have said, " for God's sake, let my son, " have a tutor who is a gentleman and a scholar, and " above all things a true Whig : This poor country, I am " afraid, will be over-run with Tories, Scotsmen and " Jacobites." Now, altho' I am persuaded that gentlemen of the last description, should they change their idol, yet will never quit idolatry itself, but transfer their prostrate worship, and implicit adoration, to the golden image they adopt ; yet I fear them not, in this kingdom, at least ; under the present Sovereign, who is by all men most justly esteemed for the excellence both of his public and private character in war and peace.

Of this, however, I think every Englishman may be assured, that the two real pillars of our constitution are Parliaments and Juries, and that, in order to be what they ought to be, the former must be independent of the

Crown,

Crown, and the latter of the Judges, let the privileges be what they will that are requisite for this.

With respect to men, I have as bad an opinion of many that are out as any body can have of the motly actors that are in ; but whenever the Crown-patentee, or Master of the Theatre shall substitute other performers, I hope some disinterested men will lay hold of the occasion for making some resolutions, and perhaps some laws that will be a security upon record for men much younger than myself, and for all our posterity, I have thrown out my loose thoughts from a true constitutional regard for his Majesty, whose crown can never sit easy when his people are discontented ; and if, where all men allow the grievance, no remedy is applied. I am really afraid that the time may come, which a great orator once painted, when his Majesty will not be able to sleep at St. James's for the cries of his injured people. I protest that my neighbours every now and then come about me, knowing I was once of the law, to ask what next will be done ? Is it true, Sir, that such a thing has happened, and that they intend to do so and so ? What is practised against Wilkes (a sad debauched dog that used his wife ill 'tis true) may be practised against us ? Pray, Sir, what advantage is there that art, treachery or power could either invent, purchase or command, which has not been strained to the utmost, in order, as it seems, to compass indecision only, and that in a very plain matter, of universal consequence ? We none of us now know any more of the law about libels, warrants and commitments, than we did before ; one man says one thing, and another man says another ; and as to the letters in the *Gazetteer*, *pro* and *con*, we can neither make head or tail of them ; there is so much said on both sides, and so many distinctions made, that we are never the wiser for what we read ; if we could see but a short resolution in the printed votes of Parliament, we should all of us know what to think upon the subject ; but great men are taken up with their party disputes, and never consider us common tradesmen and inferior gentry at all. To which I can only say, that they must not so soon lose their patience, every thing I make no doubt will be properly settled by and bye, (even the High Stewardship of Cambridge.) I have heard that the Attorney General should say, he was in hopes of having a solemn determination, not long first, upon

upon these very points in some of the great courts of law, perhaps from Lord Mansfield; and that I thought it was very probable the Parliament would resume the consideration of the same matter, and come to some satisfactory resolution thereupon; that the Ministry opposed such a resolution the last session, because, perhaps, they might be glad to have a little more time to understand the matter; they might not, perchance, be men of very ready parts or quick genius, and they were too honest to decide any thing before they understood it; and that their having voted for the putting it off merely for four months, had the appearance of the utmost moderation; they had, besides, many weighty affairs in hand, and might possibly be a little prolix in their nature; but I was sure they meant well, and had great reason to believe that they thought as the rest of the world did; in short, that there was no room yet for people murmuring, it was not quite two years ago since the principal affair had happened, which was nothing at all in matters of law.

The Attorney, indeed, gives another turn to the matter, but I had not read his pamphlet when I made this answer to my neighbours. He says, that he really does not think the matter of much consequence; he allows the people, in general, were very uneasy and alarmed; but then he declares, that, till he had informed himself better, he “ expected to hear a regular system laid open, by which an “ arbitrary administration had endeavoured to overthrow “ the bulwark of our liberties, that the *privileges of Par- “ liament* had been daringly violated; that some *innova- “ tions* had been attempted to annihilate *Magna Charta*, “ the *Habeas Corpus*, or some other pillar of the consti- “ tution; in short, that *some man* had been oppressed by “ arbitrary violence, tyranny, and persecution.” (His expression indeed is, *innocent man*, but I have left out that word as perfectly unnecessary, because a guilty man in this country is not to be knocked on the head, or tumbled into the river in a sack, because he be proved guilty by due course of law, and *then* he is only to be executed as the judgment of the law shall direct; for, the putting of any one to death, without the intervention or sanction of law, will be, at any time, and in any man who does it, *tyranny*, arbitrary violence, and murder.) Now, I need say nothing more to the Attorney upon the case of the man he points

to, than I have done already, but, as to the other parts of law which he mentions, I will very frankly avow to him, that I think them very capital rights of an Englishman; and he may see that I have treated them as such, and considered them as very materially interested, even in the case of the very man we have been conversing about. However, to oblige him, I will tell him some few of my thoughts upon these and some other legal points for him to think of by himself, or, if he pleases, to talk over with his superior; altho' I shall only touch them slightly in passing, and not launch out into all that the subject or the times suggest to my mind.

I have ever regarded the Habeas Corpus, both at Common law and under the act of Charles the Second, as the great remedial writs for the delivery of a freeman from unjust imprisonment, either by private violences or public tyranny, and even from just imprisonment in every bailable case. For which reason I hope never to see such a writ trifled with; and that if any lawyer should advise any officer of state to make a fallacious and inadequate return, by saying *the prisoner was not in his custody*, when in truth he had been seized by his order, and in his hands, and was but just gone from thence, by *his* having sent him to *close* confinement, where no person could afterwards possibly get at him, in order to ground an application for a second Habeas Corpus; I should hope to see the vengeance of parliament, so soon as the fact was known, lay hold of such lawyer, and by its order commit his body to the same sort of durance, and then come to a resolution, that such return was a deliberate mockery of justice, and a most audacious perversion of the great law of Habeas Corpus, and make the same the ground work for a new declaratory and explanatory act, compelling the man who was served with the writ, to set forth what he had done with a prisoner, or what was become of him, if he had at any time been in his custody, and happened not to be so at the time that the writ was served upon him; and likewise compelling a Judge (as some sort of remedy against *close* confinement) to award a Habeas Corpus upon the suggestion or motion of any man, who should only say, that he believed his friend might be shut up in such a place, and that it was impossible for him to have admission to ascertain the fact himself. Indeed, it strikes me that
such

such a return as that before-stated, is false and untrue, because, whether I keep a man myself, or send him to any other person to keep, the Law must consider him as still in my custody, *qui facit per alteram, facit per se*. I hope we shall never see any Chief Justice, especially in that great Court of criminal process, the *King's Bench*, who shall deny, or delay, the issuing one of these writs to any man who applies for it, being a writ of right to which the subject is intitled for asking, without any affidavit whatsoever. In many cases, as, for example, in that of *close confinement*, it may be impossible for the party either to speak to a friend, send a letter, or make an affidavit, and consequently, if either be required by the court, it will be a virtual denial of the writ, and a means of defeating the Habeas Corpus act. The requisition of an affidavit puts it likewise in the power of a Judge to object to its form or contents, and to say the same is not full enough; and yet, before another can be had, the party guilty of the violence, upon being apprized of what has passed, may, by means of this delay, remove the prisoner to some other place, or shuffe him into some other hands, nay, hurry him into a ship and carry him to the East or West Indies, and then all attempt for redress will come too late, and be in vain. An application to the *King's Bench* for an Habeas Corpus in term-time, used to be esteemed, I remember, a mere motion of course: "Our inheritance is right of process of the law, as well as in judgment of the law." The condition of the subject would be still worse, if any Chief Justice, instead of granting the writ prayed for, should force the party into the taking of a rule upon the imprisoner, to shew cause why he detained the person imprisoned; and this last miserable remedy would still be rendered less adequate, if the person applying was obliged to give notice of such rule to the Solicitor of the Treasury, as well as to the person imprisoning; and even this again would be still made more grievous, tedious and precarious, if the Judge should be critical upon the affidavit of the service of notice, and be extremely rigid in its being most punctually set forth, in every the minutest circumstance. What a noble field for delay, evasion and final disappointment, would this open to every committer of violence; and how easy would it be, in the mean time, to dodge the man imprisoned

prisoned from place to place, and from hand to hand, so as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring minister, might thus easily transport a troublesome prating fellow, to either India, long before any cause could be shewn upon such a rule. I am informed, that a freeholder, pressed for a soldier under a temporary act of parliament, was two years obtaining his liberty under one of these rules; altho' he did his utmost by money and counsel during all the time, to push on the hearing of his case upon the merits: Indeed, he had the great good fortune not to have his regiment removed farther than from Falmouth to Carlisle, in the whole time; for, had it been ordered abroad, I do not see how he could have had any relief, until the end of the war, before which he might have died of diseases, or been knocked on the head by the enemy. But it would be even still much worse, if any Judge should take it into his head for six weeks together, that noblemen were so great as to be privileged from a Habeas Corpus; and that a Peer could not be attached by the *King's Bench* for treating the court with opprobrious language, and threatening to shoot the person who executed their writ, if he did not withdraw from his presence; let the Judges touch him if they dare, perhaps he might by and bye write a *letter* to them.

What would the Attorney say, if any Chief Justice in concert with an Attorney General, at the request of a foreign Ambassador, should send a verbal order for detaining a man twenty-four hours, and for seizing his papers, because he was printing something which his Excellency did not like; and there should never afterwards be any warrant granted, information filed, or prosecution intended; the sole end of the Ambassador being answered by getting possession of the papers?

Or, if the legislature, after a violent opposition in the Commons had passed an aristocratical act, to prevent unequal matches, that is, to hinder property as much as possible from diffusing, by rendering all marriage between people under age impracticable, unless upon certain conditions; contrary to the principles of love, liberty, population and commerce, which all require, that as little restraint should be laid upon matrimonial connections or property as possible; a Chief Justice was to endeavour to

carry such act farther than the legislature had done, and to extend its regulations to a country not named within it, to the disquiet of many people who had fled thither for the beneficial purpose of lawful marriage, according to their own inclinations; by throwing out his sentiments from the bench, in disfavour of the validity of such marriages, extrajudicially, no match celebrated in that way having ever come in judgment before him?

Or, if any foreign foldier in this kingdom should be committed for felony, a lawyer in the service of the crown should be consulted thereupon, and he should advise a Secretary of State that he might, by letter in his Majesty's name, lawfully order the Mayor of the town, in whose prison such felon was, to discharge him without bail or mainprize, or even the consent or knowledge of the prosecutor, in order to prevent thereby the foldier from being tried by our laws for such felony?

Or, if any Chief Justice, contrary to the usage of Judges, who are to have no ears for any thing that is to come in judgment before them, until the same is brought on judicially, should, weeks before any crown trial, officiously send for the proceedings, to see whether they were legal, and, upon discovering an error on the prosecutor's side, should summon the Attorney of the other side, and tell him he must consent to the setting right of this error, to the end that the *tenor* of the pleading might be such as judgment could be pronounced upon; and, notwithstanding the Attorney should protest he could not consent thereto upon the account of his client, and that the same was a criminal prosecution, and that such alteration of the record was not warranted by any adjudged precedent; should nevertheless arbitrarily direct it to be done, without either having the point debated before himself by council, or brought on before the whole court for their opinion; and that the defendant, being found guilty by the Jury, should be deprived, by such amendment, of taking advantage of the error aforesaid, in arrest of judgment, which he might otherwise have done, and the same would have been fatal to the prosecutor?

Or, if any Chief Justice, notwithstanding the maxim forementioned, should make it a practice to send for Attornies, and talk to them privately about their causes, and even read the briefs in them, in order to see such secrets
of

of causes as are only confided to council, to be managed as they shall think proper, and by that means should frequently come into the court with a bias upon his mind ?

Or, if a Chief Justice should tell a Secretary of State, for him to tell a foreign Minister, that he need not be uneasy about such a particular man, for the term would come within three weeks, and that then *he* should be able to give judgment against the man, (a libeller convict) and that *he* intended to set a fine of 500l. upon him, and to sentence him to two years imprisonment besides, if he did not make off ; and that if he did, there would then be a riddance of him that way ; so that his Excellency might be perfectly easy about him in all events ?

Or, if any Chief Justice, upon the affidavit of an unlicensed alehouse-keeper, supported by a great Tory family, should entertain a complaint, accompanied with no imputation of corruption, against a Justice of Peace, who had acted upon a matter within his jurisdiction, and had only exercised that discretion which an act of parliament gave him, and where his power was summary and final ; and should at first threaten a rule for shewing cause why an information should not be awarded against such Justice of Peace, and should at last make a rule upon him to set forth his reasons for not granting a licence, by way of terror, to hang over his head until the next licensing time should come round ?

Or, if any Chief Justice should, by unnecessary givings out from the Bench, endeavour to blast the repute of Juries with mankind ?

Or, if any Chief Justice should arbitrarily order a Juror to be set aside, without any cause of challenge, and forbid his being ever put upon another panel, only because such Juror had withstood his directory opinion in a former trial upon a matter of fact, whereof, by his oath, he was to form his own judgment* ?

Or, if any Chief Justice should assume to himself at *Nisi Prius*, the provinces of Judge, Council, and Jury,

* In the reign of " *Alfred*, one Justice *Cadwine* was hanged, because he " judged one *Hackwy* to death without the consent of all the Jurors ; for " whereas he stood upon his Jury of twelve men, because three of them " would have saved him, this *Cadwine* removed those three, and put others " in their room on the Jury, against the said *Hackwy's* consent." *Horn's Mirror of Justices.*

by cutting short the one, and imposing his own sense of things upon the other?

Or, if any Law-Privy-Counsellor should, by way of introducing an arbitrary government in the plantations, lay it down to Counsel as a principle, that *English* settlers, by going from hence to people American colonies, thereby lost the privileges of Englishmen, and the benefit of the *English* common law, and were to be governed ever after by the charter of the King, and by prerogative, and that the board would judge them accordingly?

I say, if any of these things should happen, I should in my turn "be glad to know" what the Attorney, as a Lawyer, would say to them? I will tell him very fairly, that from such premises, I think, old as I am, I could draw up a strong set of articles: For, what in a common man is a breach of the law, is also a breach of trust in a Judge; and where he obstructs justice and changes the law, it is treason at common law. It would, indeed, be very unhappy for the subjects of this country, if there were a man to whom any one of these things were applicable; and the Lord have mercy upon the nation, if a time should ever come, when they shall all center in one and the same man. Being got thus far, I will ask him what opinion he would have of the veracity of a Judge, who, having tried an old gentleman for perjury, where there were four positive witnesses for the prosecutor, to the words being spoken which were charged, and which were probable in the nature of the case, and four witnesses for the defendant; in short, his followers, who swore that they were very near their master, and must have heard the words, had they been spoken, and they heard them not; and that the Judge thereupon found it necessary to labour to the Jury the character and fortune of the defendant, and the utter improbability of his having denied upon oath, his having uttered the words, had he really uttered them; and that after a good deal of hesitation and doubt, the Jury at last acquitted the defendant: I say, after such an acquittal, what would one think of a Judge, who should, in a public assembly, wantonly and unnecessarily mention this case, and declare there was not the least colour or pretence for the prosecution? What the Attorney may say, I know not, but I am sure, for my own part, I would never afterwards give such Judge
any

any credit for any fact he should advance upon his own testimony only, however glad I might be to hear his reasoning upon any subject whatever.

It is the preservation of the constitution in its due order which must continue us freemen ; nothing else can. And such a horror have I of the introduction of any new *criminal* law into this country, that, were it to happen, rather than submit thereto, I should be even for accompanying a noble Law-Lord to *ultima Thule*, which, by the shiver he spoke it with, I guess must be Scotland, the very northern scrag, or bleakest barebone of the Island. A man would in truth fly any where in such case.

Whilst our laws continue unprofaned, lawyers will of course be considerable, their profession honorable. But when civil liberty dies, by foreign or domestic invasion, the vocation of a lawyer will soon become equally mean among us, to what it actually is now in all foreign countries, where the monarch by the sword and the army lays down his will for law, and breaks through the forms of courts and their rules of justice whenever he pleases. The true language in this country is that of a late famous minister, who said he would have it be known throughout his Majesty's dominions, that all men were still to be subordinate to the civil power. For which reason no greater misfortune can befall a nation than to have a versatile, temporizing, unprincipled Grand Justiciary, nor any more general blessing than an able, uniform, firm and incorruptible Chief Justice. What therefore must be the weakness or the thoughtlessness of any minister, who should endeavour, in public discourse, to lessen the reverence of every Englishman towards Judges in general, by treating the most solemn adjudication of a supreme court of law, delivered upon oath, as he would the profligate proceedings or abandoned votes of a motley crew of unsworn and ignorant election-men ? or who should wantonly, in a great and ceremonious assembly, start a vulgar idea that tended to degrade any one of their judicial determinations to a level with the scoundrelly conversation of the liverymen of Peers ? I will venture to say, that by debasing the reverend Judges, you tend to raise a contempt for all civil government ; and when the veneration for Judges and Laws shall once fall to the ground, neither Juries nor Parliaments will long survive, but they will all be delivered up to the mere

mere discretion of the Prince, who will soon find it much easier and shorter to govern by his own will and pleasure, that is, by a privy-council and a standing army, and thus levy, without doubts or difficulties, whatever money, or execute whatever orders, he shall in his wisdom prescribe. One principal drift, therefore, of this my letter, is to let mankind see, from facts, who are, and who have been, when in power, in their several departments, the defenders of this noble and antient constitution, and who the perverters, violators, and impugners, of the civil rights, laws and privileges, both of the people and their representatives. The goodness of his present Majesty will prevent any great excess in his time, altho' the laws should be so prostrated as to render it practicable without punishment; but, who can answer for his successors? It will not be difficult, when once the law can be rendered subservient to a Ministry, for any cunning and selfish Prince to find out a Solicitor for his Treasury, an Attorney General for himself, and a Chief Justice for England, who shall devise means for grinding the face of the subjects, until they shall all be ground unto powder.

It is an inglorious, a disheartening, and a disadvantageous thing, to have a successful war followed by an inadequate or insecure peace; but, the preservation of conquests is not, by any means, of so home a concern to any commonwealth, as the preservation of its constitution. Breaches of the latter, are the most melancholy and fatal forerunners of absolute slavery and ruin. And nothing can aggravate the misery of such a view, but to see the same men the invaders of domestic liberty, who have been the ceders of foreign acquisitions.

The Attorney himself who has forced me to these reflections, for he concludes with intimating, that we are "threatened with evils, which our united strength can scarce avert;" by which he must mean another war. Now, if this be so, I am heartily sorry for it, from the bottom of my soul, and do therefore most sincerely concur with him in asking—"In this situation, is it a time for private jealousies and private interests to consume the interval that peace affords us! To sow the seeds of diffidence, to revive the distinctions of party, and wantonly to sound the alarm of *privilege and prerogative*?" In my conscience it is not, and what ministers

ters can mean by so doing, if they really intend the service of their royal master, I cannot conceive. I vow to God I am astonished at it!

Nor should I have thought of saying one half so much upon the subjects of this letter, were it not to vindicate the laws and the constitution from the attack made upon both by *The Defence of the Majority*. The main intent of which is, “ a plot and practice, to alter and subvert the frame and fabric of this Commonwealth. He labours to infuse into the conscience of his Majesty, the persuasion of a power not bounding itself with laws. He endeavours to persuade the conscience of the subjects, that they are bound to obey commands illegal.”

I will now take a final leave of the Attorney, having had proof enough of his fairness in argument, and his modesty in assertion; but, since he has talked so much of our distressed situation, both foreign and domestic, and of the House of Commons, I will apply to the present subject, what a great man *, a Tory too, said on another occasion, with a change of three words only.

“ S I R,

“ In all the variety of company I have kept, I have never heard a single man without doors pretend to justify this measure; and when the sentiments of particulars were such, I did not expect, when they were met together in a body, to see a majority vote for it. This must be owing to one of these causes: either gentlemen were convinced by the arguments made use of in the House for justifying this measure, or there are other methods of convincing besides reason. I am not at liberty to suppose it the latter, therefore I must suppose it the former. But this, Sir, is to me a very melancholy consideration; for, tho’ I have attended with the utmost regard to all that has been said upon this measure, I have not heard a single argument in its favour, that has had the

* Sir William Wyndham, father of the late E. of Egremont, and of the Hon. Mr. George Grenville, and Chancellor of the Exchequer for the Tories under Queen Anne. He was committed to the Tower for *high treason* in 1715, and delivered under the Habeas Corpus act in 1716; and his case under that statute was the great case urged in favour of Mr. Wilkes, when brought up by Habeas Corpus to the Common Pleas, in order to be delivered from a commitment to the Tower, by his son, for a *libel*.

“ least

“ least weight with me. I must now conclude that I do
 “ not understand reason when I hear it, therefore I am
 “ resolved to retire. However, I must beg gentlemen
 “ to consider the consequences. This adjournment is in-
 “ tended to convince mankind, that the measure now un-
 “ der consideration is a reasonable and an honourable mea-
 “ sure for this nation ; but if a majority of fourteen, in
 “ such a full House, should fail of that success; if the
 “ people should not implicitly resign their reason to a vote
 “ of this House, what will be the consequence ? Will
 “ not the Parliament lose its authority ? Will it not be
 “ thought that, even in Parliament, we are governed by
 “ a faction ? For my own part, I will trouble you no
 “ more, but with these my last words, “ I sincerely pray
 “ to Almighty God, who has so often wonderfully pro-
 “ tected these kingdoms, that he will graciously continue
 “ his protection over them, by preserving us from that
 “ impending danger which threatens the nation from
 “ without, and likewise that impending danger which
 “ threatens our constitution from within,”

I am, Sir,

Westminster,

Oct. 17, 1764.

The FATHER of CANDOR,

Libertas & Natale Saluti.





NEW POSTSCRIPT

T O

Letter on Libels, &c.



[PRICE ONE SHILLING.]

* • *The new passages in this Edition are, from the last line but two in page 6, to the end of the second paragraph in page 11. From the second line in page 16, to the end of the same paragraph in the succeeding page. From the beginning of page 18, to the end of the paragraph in page 23. And from the fourth line in page 25, to the end. With some lesser ones in different places.*

Father of Candor, sequel
A

POSTSCRIPT
TO THE
LETTER,
ON
LIBELS, WARRANTS, &c.

IN ANSWER TO A
POSTSCRIPT
IN THE
DEFENCE of the MAJORITY,
AND

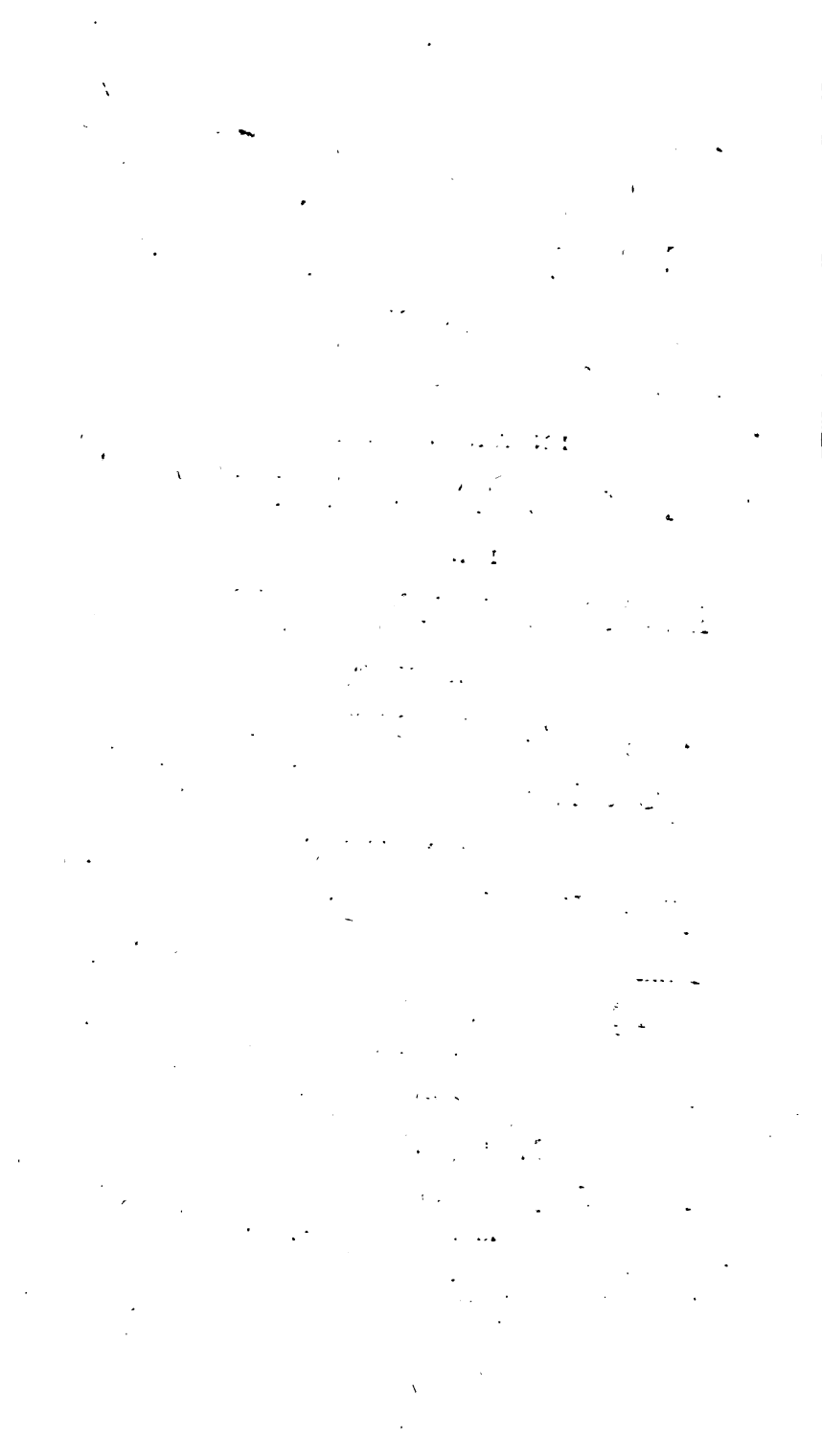
Another PAMPHLET, entitled,
CONSIDERATIONS
ON THE

Legality of General Warrants.

THE SECOND EDITION,
CONSIDERABLY ENLARGED.

L O N D O N:

Printed for J. ALMON, opposite *Burlington-House*
in *Piccadilly*. 1765.



P O S T S C R I P T.

 SHALL here, in very few lines, make some reply to the *Defender* in his Postscript, and to a late *Considerer*, premising that I do not think a stater of facts, from whence a bad character issues, is a calumniator, but an historian; and sincerely hoping (notwithstanding the *Defender's* threat) that no writing of mine will give occasion to the last dying speech and confession of the constitution*, should he and his party have any intention of giving the finishing stroke to it.

I will now ask the *Defender*, whether the star-chamber did not exist before the reign of Henry the 7th, altho' it were little resorted to; and whether, before that time, it was not the King's attorney, or coroner, in the King's Bench (that is the master of the crown office) who filed informations at discretion; and whether, That was not the grievance intended to be redressed by the statute of William the 3d: and, after all, how the nature or oppressiveness of an attorney general's information is at all altered, or affected, by the disputed period of its commencement?

He says, "The nature of libels may differ as much as the complexions of the writers." This I do not comprehend. Individuals of the same species may differ in complexion, but not in nature or kind. A misdemeanor is one distinct kind or

* Defence of the Majority, 2d edit. p. 46, 7.

head of crimes; libel is a species under it, and the particulars, or individuals of this species, may differ in some features from each other; but, being all of the same species, or class of crimes, they must partake of the same nature, or kind. They all issue from the same stock, altho' their learning, principles, manners and behaviour, may be different.

I am equally at a loss to understand, how he " maintains that comparison of hands is *no* evidence of hand-writing in a criminal case," and yet insists, that it " has been always admitted there, as circumstantial and corroborative evidence." If it be no evidence, it cannot corroborate or authenticate. *Ex nibilo nil fit.*

He says, he " never met with an instance where the House of Commons have expounded a point of law at that time pending in the courts below, by a mere resolution or declaration, which might intimidate a judge, or prejudice a jury in a cause actually before them." I desire him to recollect, whether an information was not pending against Mr. Wilkes for being the author of a libel (the North Briton, No. 45,) when the present House of Commons resolved the said paper to be a libel (which is a nice point of law in the notion of the *Defender* and *Considerer*) and then resolved Mr. Wilkes to be the author of it; and whether, afterwards the trial of this very information was not had, and Mr. Wilkes found guilty, by a judge and jury? The influence, however, of the said resolutions upon the judge or jury, I am not aware of.

* The *Considerer* stumbles in the very threshold, for he begins his *considerations* with a misrepresentation

* I must tell the *Considerer*, in answer to his first note; the common opinion among lawyers has always been, that no judge, in a criminal proceeding, ought to know any thing of the record before the trial comes on, unless one of the parties in open court move something thereon; because a Judge is to be

tation of the point in dispute, by supposing the question to be upon *the propriety of a parliamentary regulation of the exercise of General Warrants*; whereas the question is whether the House of Commons cannot with propriety *declare* them to be illegal. An act for regulating the exercise of them must suppose they are legal, the very thing that is denied, and which no man pretending to be a lawyer, before this author, ever affirmed. He says, "I have not produced a single legal authority in support of the illegality of general warrants" and therefore presumes "that no authority whatsoever can be found for this purpose." A sufficient answer to this would be, that the very supposition is drawing into question first principles, which men in a learned profession, among each other, never dream of citing authorities for, such elementary parts of science being only proved by the teachers of Rudiments, or the writers of regular systems, who must both begin *ab ovo*. Nevertheless, let him look again, and he will find Lord C. J. Hale and Serjeant Hawkins cited, and not "the opinion of a present Chief Justice" (justly esteemed of the greatest weight and founded on the most unquestionable principles of law, as it is; and called for, insisted upon, and reluctantly extorted, as it was, by the jury who imagined it necessary to be known for regulating the *quantum* of the damages they should give.) The citation, however, of authorities

be unprejudiced and impartial. The making of an *immaterial* alteration in any chamber would be folly; the making of a *material* one *without consent*, seems to be injustice, seeing it might prevent and remove an objection, fatal after trial, in arrest of judgment. And, what Attorney in his senses would complain to any court against the president in it? I challenge this sophist to produce one *adjudged* precedent of such an alteration. His supposition of there being no difference in legal signification between the words *Tenor* and *Purport* is grounded in ignorance; the former having been *determined* to import an exact recital, and the other only the general meaning and effect, of any deed or paper. For which reason the first has been held to be sufficient, and the other insufficient, to ground a conviction.

was in me a work of mere supererogation ; because it is a confessed maxim in law, that there must be absolute certainty in all process. Even in *civil* cases this is required, where the name itself is necessary, and any mistake in it is not endured. And yet the injury is not so great to the character of a man to be arrested for a civil as for a *criminal* case, which carries so horrid an imputation with it.

The objection to the warrant so much complained of is, as the *Considerer* truly states it, *on account of the general description of the Offender*. But, if I understand him aright, he himself admits the proposition, by contending in behalf of the warrant in question, that it "contains a specific description " of a particular person ; that too, which of all " others is solely and peculiarly applicable to him, " the commission of the offence." For, a *general* description is the reverse of a *specific* one, "solely " and peculiarly applicable to one person", *quod convenit soli, non omni*.

Indeed the fallacy of the *Considerer* is notorious in this place ; for, he first undertakes to prove the legality of *general* warrants, but then reasons upon a warrant *containing a specific description of a particular person, solely and peculiarly applicable to him*, which is to all intents and purposes a special warrant, and comes within the alternative I mention, namely, that every warrant must express *the name or a certain designation of the person*, which last too, by the way, will afford room enough for the apprehension of any *murderer*, and prevent every possible failure of justice.

But, let me ask him, how *the commission of the offence specifies the person* ? Somebody without doubt must commit the offence ; but, how does a description of the offence describe that somebody ? The gentleman has confounded himself between a specific description of the offence and of the offender.

The

The warrant, it is true, contains a particular description of a certain paper, by setting forth its peculiar title; so as to point it out to every body at first sight; but, I will defy the *Considerer* to say that the general denomination of *Author, Printer or Publisher* makes known any one man or individual person whatever. A paper or book has its title printed in the title-page, and it goes every where by that title; but, no man walks about with the title of *Author, Printer or Publisher of the North Briton, N^o 45*, imprinted on his face, nor is that the way of fixing identity in men, this being done by the Christian and Surname, or by a delineation and minute designation of their person and features, &c. such as we see military officers describe their deserters by, or as Sir *John Fielding* uses for highwaymen.

The law, to warrant an apprehension, requires a certainty of the person as well as the crime, they must both be specified in the process, or the execution of it is illegal. It would otherwise be liable, from the generality of the description, to be executed upon wrong people, which the freedom of our constitution will not permit. There is nothing in the countenance of any man (of A more than of B or C) which can determine him to be or not to be the Author, Printer or Publisher of any piece; so that many innocent men would be causelessly harrassed from vain, light surmizes, and idle reports of ignorant, ill-informed or ill-intentioned people, were such general warrants received. Therefore some person in certain must be named, or by notorious and visible marks particularly pointed out.

Would any man of common sense say that Sir *John Fielding* had issued a proper warrant for the seizure of any particular person, if he had granted a warrant for the apprehension of *the highwayman*
who

who robbed Mrs. C. between London and Knightsbridge, at such an hour and such a night, of twenty guineas and her watch? What man could be legally stopped and taken up as within the description and by virtue merely of such a warrant? For, is not every man who has the use of his limbs able to rob? And yet, according to the shrewd Considerer, it contains a specific description of a particular person; that too, which of all others is solely and peculiarly applicable to him, the commission of the offence.

It is really absurd to contend that by describing the offence you describe the offender; or that an officer has any certain ground to go upon in the execution of a warrant containing neither name, definition, nor portrait of any individual whatever.

Is it therefore to be wondered that in the case of Mr. Wilkes, under the general warrant then issued, many people were taken up, who were neither Author, Printer or Publisher? For, is not every soul, woman as well as man, capable of publishing a libel? It is in truth so strange and random a way of proceeding, and so productive of injustice, that one would think, after such recent experience, our most exotic apprentices to the law would be sensible of it. They may be assured withall that what is not agreeable to common sense, or is uncertain in itself, can never be rendered either plain or positive by any metaphysical twist in talking or writing about it.

This refined writer, however, seems afterwards to unsay what he had before asserted, by conceding that *he by no means approves of general warrants where special can be of effect.* This surely is contradicting General from Special warrants! wherefore I wish he had either shewn how a *specific* differs from a *special* warrant; or else how a *general* warrant can be specific, in one and the same sense.

The

The same warrant may be certainly specific as to the crime, and yet general as to the person; but, unfortunately for this scribe (who seems to hold *the eel of science by the tail*) the *English* law requires the specification of both.

Furthermore, he is mistaken in supposing I admit General Warrants to be legal in Treason; for, I condemn them expressly in all cases. Indeed, a little reflection must convince any one of the necessity of a contrary doctrine.

A man to be apprehended at all must be guilty of some breach of the law; and this must either happen in the view of the magistrate, or be proved to him by oath, before he can issue a warrant for his arrest. The process must specify both the offence and the offender. For, if this were not so, it would not be the magistrates, but their officers who would adjudge what person should be taken up. Now, the last are merely ministerial and can only execute orders, which therefore must be precise. It is the province of the magistrate alone to judge, and no man can delegate his judicial capacity to another. But, if he grant a discretionary, that is, a general, and not a particular warrant, the officer is left to judge for himself. The law would therefore act vainly in requiring the magistrate to have information on oath (of good cause of suspicion, at least) against a *particular* person, before he issue any order for his caption; if his officer can take up *any* man he shall think fit by virtue of general words and his own discretion. The liberty of every *Englishman* would then be left at the mercy of every impudent Bailiff, Constable, Messenger, or Footman, intrusted with process.

Even in *Hue and Cry*, where *fresh* pursuit is made, the felon must be described, and also the way he is gone.

Let

Let me now suppose that *Leach* had defended himself and his house, and killed the Messenger. Would he, I desire to know, have been guilty of murder; the warrant, that he was apprehended by, naming nobody, and he being no object of it, neither within the letter nor the spirit of it? On the other hand, had the Messenger killed *Leach*; would he not have been clearly guilty of murder?

A power of dispensing with the law and its forms of justice has I know been formerly claimed as a royal prerogative, but not even a *Civilian* I believe (of the most northern extraction) will venture to broach such maxims now. It is indeed profligate nonsense to pretend that what is contrary to the common and statute law of this realm can be legal, let it be commanded by any other power whatever. There is no *law of government* beside or paramount the laws of the land. In the time of Charles the First, upon the imprisonment of the Members, in the fourth year of his reign, Serjt. *Ashley* (in his argument at the conference between both houses) asserted that *Lex Terra* meant divers kinds of law, as the Common Law, the Ecclesiastical Law, the Admiralty Law, the Law of Merchants, the Martial Law, and *the Law of State*, and that by this last sort of law Kings could imprison their subjects at their pleasure, without shewing the cause. But this the Serjeant's zeal for slavery offended in those days both the Lords and the Commons, and he was immediately ordered into custody for the unconstitutional doctrine he had advanced. However, upon his humble petition, submission, recognition of his fault (in arguing that a King of *England* could govern by a *law of State*,) and asking pardon on his knees. He was at last discharged.

The hair drawn distinctions made use of to put a difference between Scroggs's and Lord Halifax's
general

general warrants are unworthy any answer, and become only a sophist in his noviciate of logical disputation at College. And, the words *which should there be published* are not in one of the warrants cited by me. A circumstance immaterial in itself, were it not to shew the little trust that one ought to repose in this slippery writer's assertions or quotations.

The best way perhaps of answering a man who *reasons* that the *King's Bench* approve such warrants, because people have been there admitted to Bail under them, is to bring him to the *fact*, that is to the *King's Bench* itself, and then he will be convinced by his own ears and eyes that the Court never examine the validity of any warrant, unless when called upon so to do.

The *Considerer knows*, it is seldom worth the while of any man who brings a Habeas Corpus, to question the legality of the form of the warrant for his caption, because a regular one would be issued immediately, and he must then be at the expence and trouble of being brought up again by another Habeas Corpus. What council, therefore, would touch upon an objection of form, if he had nothing of substance to urge for his client's discharge? The best thing for him, is to be bailed as soon as possible. The *Considerer knows*, that neither court nor council would officiously act so nugatorily and unkindly. The only Chief Justice of our time, who has had a man before him upon a general warrant (excepting the late case of Mr. Wilkes) is my Lord Mansfield. Dr. Shebbeare was apprehended by such a warrant, and brought before his Lordship; but, he took no notice of the obvious defectiveness of the warrant, and admitted the Doctor to bail under it. And yet, I never met with any man, before the *Considerer*, who either blamed this conduct, or held such

B

general

general warrant to be legal. Rumour whispers, that in the case of Mr. Wilkes, the Secretary of State said, "as we know him to be the author, why not name him;" and that ^{it} was a noted Solicitor who prevented this being done, by telling his Lordship "*it was better not.*"

I leave the reader to judge, whether the *Resolution* proposed in Parliament did not spring out of an Inquiry into the conduct of Mr. Webb and Mr. Wood, and then desire he will judge of the Candidness of the *Considerer*, who treats it merely as a spontaneous motion grounded on nothing. He need but read the Votes or Journals*. It is
beneath

* Mr. Wilkes's case gave rise to the message and the complaint about privilege, and to a very long inquiry in parliament. From the matter then disclosed, the resolution proposed about general warrants in libel took its rise, and it was framed according to the very words of the warrant that had been actually issued. At the opening of the motion, it was declared, frequently mentioned in the course of the debate, and fully understood by every body, that this resolution was to be followed by another, declaring the execution of such a warrant on a member to be a breach of privilege. (Indeed, that follows of course, for any arrest, that in the case of a common man is illegal, in the case of a member, is a breach of privilege.) In short, the rise, the progress, and the end of the whole was privilege, and yet this is the part which the shrewd *Considerer* particularly slights; because, (I suppose) he knows it proves irrefragably the propriety of the Commons interfering. For my own part, I did not mean to ransack the journals for every resolution apposite to the case in question, nor shall do it now; but, to single out instances of the Houses interposing in all kinds of cases, to shew the general nature and extent of their proceeding. However I will venture to affirm, there are more than 20 independent resolutions, to be met with in the journals, upon points of privilege and of law, unattended with any subsequent impeachment, bill, address, or order. Nay, is it not ridiculous gravely to mention in *Lilburn's case*, an order to transmit the resolution to the Lords, as an end which would justify the resolution, or as the cause of its being made: and, in Sir L. Jenkins' case, the ordering those who had given the information into custody, as what gave a propriety to the resolution, damning the commitment as illegal? Would the resolution condemning general warrants be rendered more salutary, constitutional or effectual, by a subsequent order to transmit it to the Lords, or by ordering *Money, Watson, &c.* into custody, or to ask pardon on their knees, at the bar of the House? The *Considerer* assumes, that the House does not resolve the law upon a general point, unless when it immediately arises from or tends to some other act of parliamentary proceeding. Now, apply this to Lord Danby's case. What did the resolution there arise from? A mere complaint of his being groundlessly taken up. What act of parliamentary proceeding did it tend to? A declaration of the illegality of the warrant. What other act did it lead to or end in? None at all. The order, to ask the Secretary again when he received the information, on which the warrant was grounded, can in no sense be called so. It was a part of the same thing. This order too was made the same

beneath any but a Schoolman, to waste time in weaving or destroying such cobweb Arguments and distinctions.

In Contradiction to the Considerer's Assertion, I will affirm, that *the Question of the Legality of the Warrant is not now sub judice, nor in a course of legal determination.* There is no Bill of Exceptions, either settled or sealed, where this point is made;

same day with the resolution, and is never afterwards mentioned in the journals. The apprehension of Lord Danby was a breach of privilege, because there was no information on oath to ground it. If there had, as the warrant purported to be for *reasonable practices*, will the Considerer say, that the apprehension would have been a breach of privilege, when a member may be apprehended even for a libel? It is amazing, that a subtle man, as this ex-otic writer certainly is (tho' no great lawyer) should offer such a mere cobweb for reasoning! His friends, the ministry, would have opposed the motion as disorderly and inadmissible had it been so, and not have received, amended, and shaped it, and finally adjourned it only. And pray, how can any body determine that the resolution, damnatory of general warrants, will not be followed by an *address* to the king, to desire his majesty would direct this resolution to be communicated to the privy council and the secretaries offices, to the end, that no more such warrants may for the future be issued from thence; and by an *order* that this *address* should be presented to his majesty, by such members as are of his privy council. The resolution would then *tend to an other act of parliamentary proceeding*, would be followed by a *directory vote*, and by an *order* which is the *final and executive act of the House*; so that the Considerer's rules, or clerk-like formalities, may be easily complied with in the present case, if any man can *really* think they will add aught to the weight or propriety of the resolution itself. But, if he should farther insist, That the resolution must likewise *arise* from some other parliamentary proceeding, it being impossible to connect it now with any thing that passed the last session (albeit the question was only adjourned then,) especially as the complaint against Mr. *Webb* and Mr. *Wood*, is totally discharged: I can tell him that, in my apprehension, it is not too late to move a complaint against the secretary himself, which perhaps, would have been at first the most becoming the dignity of a house of parliament, and the most constitutional (altho' not the most respectful, complaisant or tender) way of proceeding; and therefore, it is worthy the consideration of administration, whether the simple, independent resolution, should it be moved again, will not, every thing considered, be for themselves, the most eligible of all. The exotic compiler of the metaphysical *considerations* need be under no concern about its regularity. It will be perfectly so. Otherwise, let me ask him, how That momentous resolution touching an *English* parliament's right of taxing the colonies could be justified? It was an independant, substantive resolution, followed by nothing; and yet was a resolution not only of extreme magnitude, but of the most general and highest legal nature, involving in it a decision of the first and most fundamental principles of liberty, property, and government, and well worthy also, as to the temporary policy of it, the most serious of all consideration. This was resolved too, if I am informed right, at the close of the night and at the rising of the house: so that every body must have taken it as a clear thing, that they could at any time come to a resolution upon any general point of law, whenever they should see it expedient so to do. *Sed verbum sapienti sat est.*

nay farther, there is no Bill of Exceptions or Cause, now in agitation, where this point can be made: seeing, in the first place, it must be shewn that the Secretary of State is a Justice of Peace within the meaning of the Statute; and next, that there was a probable cause for arresting Mr. *Leach*, &c. before the legality of the warrant itself can at all come in question, or be material. Let the frame of the warrant have been ever so legal, unless the person who issued it was a Justice of Peace within the words of the act of Parliament, and unless there was also a probable cause for apprehending Mr. *Leach*, &c. the persons who executed the Warrant are not justifiable, any more than the Secretary who issued it. Now, there is not the least colour in *law* for maintaining that any man as Secretary of State is a statutable Justice of Peace, nor the shadow of a *fact* to prove Mr. *Leach*, &c. to be the Author, Printer, or Publisher, of No. 45, nay the Jury found the contrary; and yet not one, but both of these matters, must be fully established, before the warrant itself can come under consideration. For, I cannot believe, until I see it actually come to pass, that any Court, out of complaisance to any advocate, will invert the order of things, and consider that point first which is last in course, and which can only operate at all in favour of the Defendants, after the former have been established. A hardy assertion to the contrary gains no credit, when it stares Common Sense in the face; nor has it any other effect than that of turning ones eyes with astonishment and indignation upon the desperate assertor. It is, I allow, commonly said, that *if Truth be against a Man, he will be against Truth*; but then there should be something in the way of saying that will put a gloss upon the matter, in order to obtain a momentary credit to it. Above all such

crazy

crazy stuff should never be committed to paper ; the botchery will be presently seen through, and the unskilful tinker damned. However, I will further venture to affirm, with respect to the legality of the warrant, that no *English* lawyer thinks the *point of magnitude* for its difficulty, requiring learned discussion, or *mature consideration* : altho' many a man might be of opinion, when the liberty and property of a representative of the community were broken in upon by a minister of the Throne, Parliament would interfere, that the privileges of the Legislature might be vindicated with dignity, that is, by the Legislature itself ; the private remedy of action or indictment being too small for some cases, and the ordinary Courts of Justice too feeble to cope with some malefactors.

The *Considerer* may misrepresent and then condemn, if he pleases, my way of Reasoning about the Seizure of Papers, let him but agree with me in the Law upon that head. I write not for the sake of Abuse or Altercation, but of the just liberties of Englishmen. I desire to offend no man, who does not counteract or betray them, and I care not whom I offend that does, or attempts to do, either. In the reign of Charles the First, the Commons resolved, “ That the Searching and
 “ Sealing of the Chambers, Studies, and Papers,
 “ of Mr. Holles, Mr. Selden, and Sir John Elliot,
 “ being Members of Parliament, and issuing out
 “ Warrants for that purpose, are Breaches of Privilege : ” And also, “ That Mr. Laurence
 “ Whittacre, being a Member of the Parliament,
 “ quarto Caroli, and entring into the Chamber of
 “ Sir John Elliot, being likewise a Member of that
 “ Parliament, Searching of his Trunk and Papers,
 “ and Sealing of them, is guilty of a Breach of
 “ Privilege of Parliament, this being done before
 “ the Dissolution of the Parliament.”

The

The *Considerer* indeed says, " he cannot form
 " to his imagination any legal or political reason,
 " even in high treason or other public danger,
 " for the general and undistinguishing seizure of
 " papers."

This carries a very handsome appearance with it. But then, in page 13, he asserts that " the
 " prosecutor is at liberty to avail himself of what-
 " ever he can find in the house or on the person,
 " to prove the truth of his charge." Now, How is this consistent with the foregoing or founded in notions of law? For, without information on oath affecting particular things, nothing can in any case be touched or examined, much less seized and carried off: Let the contrary be admitted, and whenever an Attorney General shall think fit to file an information, or a Secretary of State to take up any man, be it ever so groundlessly, his house and all his papers may be rummaged and gutted by this sort of law, that is, upon mere political suspicion, in order either to fish for evidence really to prove him a libeller, or else for the sake of other intelligence which a jealous minister may want or wish for and not know otherwise how to come at. Every private paper, according to this doctrine, might be scrutinized by the examiner; for, without doing so, how could he determine whether something could not be proved from thence? And yet, no information all this while on oath might be given either to Mr. Attorney or Mr. Secretary. In a word, once admit the principle, and all the consequences of an unlimited State Inquisition follow of necessity. But, it is really absurd to suppose This can be law, when nothing can be taken from any man, in a legal way, without some specific criminal charge against it founded on oath, or on the view of the magistrate or apprehender accompanying the criminal fact.

He

He then proceeds very sillily to suppose that evidence will not be admissible, if got by violence, and asks a foolish question upon this strange supposition. But *quod fieri non debet, factum valet*, an unlawful manner of coming by papers will not prevent their being evidence when produced. The only thing that is plain from this raw writer is, that he himself has no certain notion about the matter at all.

He allows that when a Jury finds a man guilty of murder or a libel, they pronounce him guilty of *that fact which the law calls a murder or a libel*, and says that *beyond those bounds the Jury have nothing to do with the law*. This is enough for my present purpose, and therefore it is not necessary for me to scan the whole of his law-doctrine, however exceptionable it may be, concerning Jurors; altho' the old books most certainly say the Jury are judges of the law, as well as the fact, in all cases, *if they please to take it upon themselves*. *Lilburn*, it is very well known, immediately after his acquittal, published his trial, and in a remarkable frontispiece prefixed to it, proclaimed to the world that he had been acquitted by the integrity of his jury *who were judges of the law as well as the fact*. It perfectly amazes me that the *Considerer* should work himself up to affirming, *it is contrary to their oath*, when any man need but read it to see there is not the semblance of a foundation for so scandalous and wanton an assertion. Indeed, his conceptions in general of juries seem by much too lowly and contemptuous, owing I presume to his education on the northern side of the *Tweed*, where very little use is made of them, the law of the country servilely treading after that of Imperial *Rome* which was calculated for empire and vassalage, and not for freemen or a commonwealth. A like prejudice has drawn some other people into many
a scrape

a scrape which but for this I fancy they would not have fallen into.

In strictness, the Law of *England* in a judicial way knows no other *proof* but before a Jury and by record.

If a man, for example, conceives himself alluded to in any defamatory writing, altho' not named nor personally described, especially where the character he imputes to himself is supposed of some future age, He must take the sense of a Jury upon it. A Judge cannot determine the matter; it is not within his power, it is no part of his province, to ascertain an innuendo: nor can the party himself be examined, for nobody is required by our laws to furnish evidence against himself. In short, as no Starchamber exists at present, so nobody can be punished upon the mere presumption of the King's Judges; nor can a discovery be forced from the party by any torture of examination or confession. Twelve indifferent men, his fellows, must find on their oaths that the writing complained of was knowingly and maliciously put forth by the accused in contempt and disparagement of the Accuser. This is the only legal proof in such case, whereon any judgment can be founded.

So nice were our ancestors, after the Revolution, even with respect to innuendos confirmed by the verdict of a jury, that the Lords in reversing the judgment against Sir *Samuel Bernardiston*, declared "The information, being grounded upon
 " *Letters*, which in themselves were not material,
 " but made so by innuendos or supposed or forced
 " constructions, ought not to be allowed; for,
 " all accusations should be plain, and the crimes
 " ascertained."

In good faith, no *Englishman* should be construed or innuendoed into a fine or a jail even by a Jury, much less by a Judge without any trial whatever

whatever by his peers. Who is meant or what is meant by any writer is in every case to be resolved by his Country. No affidavits will serve the purpose. And, whenever a contrary doctrine shall take place, the Constitution of this country will soon be destroyed and the liberty of every man in it lie at the mercy of his Majesty's Judges. Is this what any man desires or will yet a while endure? It will not only be over with the true English Constitution; but a man may boldly say *actum est de republica*. Perchance too, *Chaos will not come again*, for I am afraid of a much worse thing, and that is lifeless slavery. The time will then exist which the modern *British* Historian only feigns of our generous Ancestors, when parliaments will be considered as an *ornament* and not as *essential* to the State, and no lawyer have even an idea of Liberty; for, according to him, the exuberant happiness of Englishmen under the first *Stuart*, made them, first rich and wanton, and that wantonness gave rise to extravagant notions, and these at length, by jumbling incessantly together, fell casually into the shape of political freedom, and thus in the golden reign of this Scottish Solomon, the notion of an *English* constitution was somehow conceived, produced or made.

Not only the reason of the thing, but history, warrants me in foreboding this consequence from such tenets. In the days of our second Scottish prince, Charles the martyr, when our old *Magna Charta* liberty was ebbing very fast, and this antient constitution verging to an end, the Starchamber lifted its crest higher than ever, and superseded the use of Juries and all other Judicatories. The *second day of Hilary Term*, 1637, an Information was preferred in the Starchamber by the King's Attorney-General against *Lilburn* and *Warion*, for
C the

the unlawful printing, publishing and dispersing of libellous and seditious books, contrary to the decree of that Court, which was verified by *Affidavit*. They were brought up to the Office, but refused to take an oath to answer *interrogatories*, saying it was the oath *ex officio*, and that no free-born *Englishman* ought to take it, not being bound by the law to accuse himself. Their Lordships nevertheless ordered, " the oath to be tendered again, and again, in open court, and the delinquents still refusing it, and to be examined, adjudged them to be guilty of a very high *contempt* and offence of dangerous consequence and evil example, and worthy to undergo very sharp, severe and exemplary censure, which might deter others from the like presumptuous boldness in refusing to take a legal oath, without which many great and exorbitant offences, to the prejudice and danger of his Majesty, his kingdoms and loving subjects, might go away undiscovered and unpunished; and therefore ordered them to be committed to the Fleet until they should conform, and to pay 500*l.* apiece, and before their enlargement to become bound with good sureties for their good behaviour; that Lilburn should be whipt through the streets from the Fleet to the Pillory, and from thence be returned to the Fleet, there to remain according to this decree." In April, *Easter Term*, this sentence was rigorously executed. But Lilburn, whilst he was whipt at the cart and stood in the Pillory, spoke irreverently and tossed about pamphlets. The Star-chamber, then sitting, being informed of this, immediately ordered him to be gagged, and made a further order " that he should be laid alone with irons on his hands and legs, in the wards of the Fleet where the basest and meanest sort of prisoners are used to be put, and that the warden of the Fleet should take especial care to binder the resort of any person
what-

whatsoever to him, and particularly that he should not be supplied with any hand, and to take special notice of all letters, writings and books brought unto him, and to seize them, and to take notice from time to time who they be that resort to the said prison to visit the said Lilburn or to speak with him, and to inform the board. Their Lordships further ordered " that the Attorney and Solicitor General should strictly examine *Lilburn* whether he did, during the time of his whipping and standing in the Pillory, utter any, and what speeches *tending to sedition or to the dishonour of the said Court of Star Chamber or any member of the said Court, and who heard them; and whether he threw about any and what seditious books and pamphlets, and of whom he had them; and what other material circumstances they shall think fit to examine upon, for better finding out the truth, and thereof to make certificate with their opinions.*" *Lilburn* in consequence of this, continued in prison till Nov^r. 1640, when the first parliament begun, and then he was released. And upon the transmission of the case from the Commons with the Star Chamber sentence, the House of Peers, after an examination of the whole proceedings and a due consideration of the sentence, adjudged " that the same and all proceedings thereon should forthwith be vacated, obliterated and taken off the file, *as illegal and most unjust, against the liberty of the subject and the law of the land and Magna Charta, and unfit to remain upon record.*"

To all the Considerer says, with respect to Juries, it is a sufficient Answer, that, Whether any Paper be a *Libel tending to, &c. against the Peace*, if at all a matter of law, it is that sort of matter of law which is *necessarily blended with fact*, and therefore, according to him, is the proper province of a jury. And altho' he represents the people likely

to be equally partial with the court, I do not conceive where or how that can happen, unless a court should at any time discontent or act against the whole people, and that is a case I cannot suppose. The contest, in a public libel, lies between the ministry and some particular people; therefore, the jury, unless taken from among those very people (which cannot be) may be very impartial, altho' the court cannot be so. After saying this, I shall leave the Considerer the uninterrupted satisfaction of asserting *Truth* to be a crime in a public libel, and of insinuating, that it is better the writer should be punished on that account, than the person truly charged by him be exposed, altho' he were even guilty of a capital crime. Let him, if he will, lay down this to be good law in a *criminal* prosecution, but not to be so in a *civil* action, against a supposed libeller. Indeed, in a note on this part of his performance, he declares a libel to be a crime upon this principle, that "whatever carries a present injury to the peace of another, does so to the peace of the state;" so that, by this way of reasoning, whatever breaks the peace of mind of any old woman is a breach of the public peace of the kingdom. But this enthymem reverses the rule of logic,

Syllogizari non est ex particulari,

or as a Christ Church-man would say, *ex aliquo non sequitur omne*. The position, in reality, is new and so extensive, that let any man have a hand in detecting the conduct of a political knave, and by virtue of it, he will be amenable to a *criminal* court for such his proceeding, as if it were really a malversation. The Considerer says very truly (I believe) "this principle seems at first to have taken place with a view to bring libels to the jurisdiction

“ tion of the Starchamber ;” but, I hope, he would not, from his particular approbation of it, or out of reverence to that abolished court, advise or endeavour the introduction of it into the *King's Bench*. I am obliged to him, however, in the same place, for admitting that the principle on which judges and legal writers hold a libel to be *criminal, is its tendency to a breach of the peace* ; because, what only tends to, cannot be itself, a breach of the peace, as the thing tending to cannot be one and the same with the thing tended to ; and consequently such tendency cannot by any possibility be an *actual* breach of the peace. Having said this, I will now take my farewell of my flimsy antagonist, and hope another time he will be convinced that plain fact and common sense, are not to be overcome by metaphysical quiddities and unsubstantial forms. The present argument, let me assure him, is above his encounter, and he will do well upon a future occasion, as well as his abettors, to

remember *Milos* end,
Wedg'd in that timber which he strove to rend.

Jan. 24, 1765.

F I N I S.

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ALTHOUGH the following ADDITIONS (made at different times to the *Letter on Libels, &c.*) were printed with the former Edition of the *Postscript*, yet as there is reason to believe several Gentlemen who bought the *Second* or *Third* Editions of the Letter, have not had these Additions, they are again reprinted; in order that they may still have an Opportunity of making their Copies as complete as if they were to buy the Book now.

ADDITIONS

TO THE

SECOND EDITION,

TO WHICH

All the Pages mentioned refer.

In page 6, after the second paragraph, read the following:

A KING of England may be considered in two respects, either in a public or private capacity. In the latter he may, as a man, indulge his own humour, in the establishment of his household and the choice of his immediate servants. But in the former, he is wholly a creature of polity; his crown, his power, and his revenue are derived from and circumscribed by act of parliament. He is indeed the first in rank of the three independent parts of the legislature, and the executive hand of the whole; but the ministers and officers by which he carries on the government are the servants of the community, and the public weal is the sole object of the entire political frame. In order, however, to preserve a proper respect and chastity of Idea with regard to the crowned head, the royal name is never to be introduced into any question of public transactions. And therefore it is established as a maxim *The King can do no wrong, &c.*

In page 7, instead of the lines from 12 to 18, read the following:

In process of time, misdemeanors came to be prosecuted by an information filed by the King's coroner or Attorney, that is, the master of the crown office; and this was considered as the presentment of the King, &c.

A

At

At the bottom of page 8, adds as follows :

An information has been frequently filed, and the miserable object of it awed into giving security for his future behaviour, without any legal ground for either, or serious design of prosecution ; and in this ignominious state of apprehension and bondage has he been kept for years together, without either being ever withdrawn.

In page 11, line 26, after the word Thought, add the following :

“ Whether any act was done or any word spoken, in such or such a manner, or with such or such an intent, the Jurors are Judges. The Court is not Judge of these matters which are evidence to prove or disprove the thing in issue.” This is our law, both in civil and criminal trials, altho’ the latter are by far the most material, because what affects our person, liberty or life is of more consequence than what merely affects our property.

In page 12, between the first and second paragraphs, put the following :

The statutes against Slander and Scandalum magnatum, (namely the 3d Ed. I. 2d and 12th Ric. II.) direct only that he who “ shall be so hardy to tell or publish any false news or tales, whereby discord or slander may grow between the king and his people, or the great men of the realm, shall be taken and kept in prison until he has brought *him* into the court *which was the first author of the tale.*”

Instead of the two last lines in page 23, and the first 12 in page 24, read the following :

Any motive of public concern ; and some of his reasons against it, indifferent men thought the strongest in its behalf, namely the delineation of our boundary in North America, which, altho’ the course of a great river is made to describe, he objected to, because its extremely distant *source* could neither be ascertained or denominated. His discourse, it was remarked, favoured more of a draughtsman arguing exceptions, than of a statesman discussing a treaty. And nothing perhaps like

like it can be recollected, saving one equivocal speech of a similar texture, delivered in another place, but at the same time and upon the same occasion; where the arguments were so artificial, qualified and verbal, without edge or substance, that it would be extremely difficult to put into clear and distinct propositions, what was either affirmed or denied touching any of the articles themselves. Indeed, I could never determine whether he had, or had not; a good conception of our foreign interests, altho' I am persuaded he had a thorough one of all the domestic connections among us. I might add, that when a bill for a militia was presented, altho' he liked the name and speciously commended the design, yet he foresaw great difficulties and infinite danger in it, recalled to mens minds the public evils that followed from arms being put into the hands of the people, no less than the destruction of royalty and the suppression of peerage; and so found innumerable objections, both religious and political, to the form and the substance of the several clauses, and to all the regulations proposed. The tide, however running for the measure, both as a national strength and a counterpoise to a standing army, he suggested several enervating amendments, to reduce the number proposed one half, and to have the other either officered wholly by the crown, or else unofficered at all, as a mere fund in the hands of the King, for the better supply of his standing army. The number was accordingly curtailed, and other qualifications took place. But, at last, when the bill became an act, things were so managed in his particular county, that the militia was never either embodied, or commuted for in money, in spite of the alternative laws for the purpose. He was apparently a principal man, &c.

At the end of the first paragraph in page 31, add the following :

The notion of pursuing a libeller in a *criminal* way at all, is alien from the nature of a free constitution. Our ancient common law knew of none but a *civil* remedy, by special action on the case for damages incurred, to be assessed by a jury of his fellows. Indeed, the doctrine in courts of law used to be, that, "no writing what-ever is to be esteemed a libel, unless it reflect upon some

"particular person." There was no such thing as a public libel known to the law. In order, however, to gratify some of the great men, in the weak reign of Richard the 2d, some acts of parliament were passed to give actions for false tales, news, and slander of peers or certain great officers of state, which are now termed *de scandalis magnatum*. Before that time, or at most the 3 Edward I. no mere words were actionable, unless some special damage thereby was alleged and proved. Even now-a-days the courts of common law will not sustain actions for mere obscene discourses, by word of mouth or writing, or for ribaldry. They leave such spiritual concerns to the ecclesiastical censures of courts-christian.

And it is very notorious from history, that the most sanctified and pharasaical ministries and reigns, when the church has been sounded the most, have been the most corrupt and slavish.

The whole doctrine of libels, and the criminal mode of prosecuting them by information, grew with that accursed court the star-chamber. All the learning intruded upon us *de libellis famosis* was borrowed at once, or rather translated, from that slavish imperial law, usually denominated the civil law. You find nothing of it in our books higher than the time of Q. Elizabeth and Sir Edward Coke.

After the paragraph, page 32, ending with any legislature, read the following large addition :

In speaking of sureties, I have not entered into the difference between those for the *peace*, and for the *good behaviour*; but the latter are certainly by much the most to be dreaded. For "surety of the peace cannot be broken without some *act*, as an affray or battery, or the like. "Whereas (according to my Lord Coke) surety *de bono gestu*, or good abearing, consists chiefly in that a man "demean himself well in his port and company, doing "nothing that may be *cause* of the breach of the peace, "or of putting the people in fear or trouble." In short, it affords more room for a latitude of construction, or for a Judge's discretion, which is very apt to operate against the subject, and should therefore be studiously avoided.

The

The truth is, at common law, surety for the good behaviour could be demanded in no case before conviction by a jury. Binding to the good behaviour was a discretionary judgment, given by a court of record, for an offence at the suit of the King, after a verdict; trial by his peers being an Englishman's birth-right in all charges, not to be taken away but by act of parliament.

"Originally, wardens or conservators of the peace, were wont to be elected in the full county before the sheriff; they had only co-ertion or prehension in a few cases, and no jurisdiction in any cause.

"But, when young Edward the 3d, by the means of his mother and Sir Roger Mortimer, had forcibly got possession of his father's crown, He instituted keepers, commissioners, or justices of the peace, as so many special eyes and watches over the common people, whereby the election of conservators of the peace was taken from the people, and translated to the assignment of the King. These justices were not ordained however, to reduce the people to an universal unanimity, but to suppress injurious force and violence against the person, his goods or possessions. In this matter of the peace (continues Mr. Lambard) the law of God respects the mind and conscience, the laws of men do look but to the body, hands and weapons: and therefore, furious gesture and beastly force of body (and not every contention, suit and disagreement of minds) is the proper subject about which the office of the justices of the peace is to be exercised."

Before the 2d of Edward 3, justices could only report to the parliament; but, by that statute, they had power to punish disobeyers, and resisters. And the 34th of the same King enacts, "that in every county shall be assigned for the keeping of the peace one Lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to *restrain misfeasors*, rioters, and all other barrators, and to pursue, arrest, take and chastise them, according to their trespass and offence; and to cause them to be imprisoned and duly punished, according to the law and customs of the realm; and also to inform of them; and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be
"now

“ now come again, and go wandring, and will not
 “ labor as they were wont; and to take and arrest all
 “ those that they may find by indictment, or by suspicion,
 “ and to put them in prison; and to take of *all them*
 “ *that be not of good fame*, where they shall be found,
 “ *sufficient surety and mainprize of their good behaviour*
 “ towards the King and his people, and the other duty
 “ to punish, *to the intent* that the people be not by *such*
 “ *rioters or rebels*, troubled nor endamaged, nor the peace
 “ blemished, *nor merchants nor others passing by the high-*
 “ *ways* disturbed, nor put in the *peril* which may hap-
 “ pen of *such offenders*.” Now, it is plain, this statute
 regards nothing but actual offenders, rioters, barrators,
 rebels and highwaymen: and surety for the behaviour can-
 not be taken thereby, but of those who are on strong
 ground suspected of some such actual breach of the peace.
 This law, nevertheless, is the origin and the sole foundation
 for the present demand of sureties for the good behaviour
 before conviction; and what is not warranted by the
 provisions of this act, is illegal and unwarrantable, the
 common law permitting no such thing, and the same be-
 ing in itself derogatory of the rights of a freeman.

Indeed, some particular statutes in subsequent reigns,
 have directed surety for the good Abearing in cases
 therein specified; as the 1st Mary, for disturbing a
 preacher, or irreverent handling the sacrament, altar, or
 crucifix; the 5th Eliz. for taking of fish in ponds, or deer
 in parks; the 23d Eliz. for absenting for twelve months
 from church; the 39th Eliz. for disturbing the execution
 of that statute, either for the punishment of rogues, or for
 the relief or setting on work of the poor; and the 3d
 James, for unlawfully hunting and stealing deer or conies,
 &c. But, these special statutes are out of the present
 question, and therefore need not be touched upon here.

To return then to the 34th Ed. 3. It appears (I think)
 uncontrovertibly from the penning of that statute, as
 well as from the acceptation of it among our ancestors,
 and the construction of antient lawyers, that security for
 good behaviour cannot be required, but where a man shews
 just cause to apprehend some bodily hurt to be done to him-
 self. And in such case, the peace-magistrate must con-
 vene the person charged, *inquire* and *find* him not to be
 of good fame where taken. He must examine into the
 truth

truth of the matter alledged, try and adjudge it upon satisfactory testimony or evidence of the thing, unless he saw it with his own eyes, before he can legally demand any surety for good abearing, or know what to take: for, he acts judicially. In short, mainprize for the behaviour, (whether by bond to the King, pledge or caution) must be by a regular proceeding of record. In fact, none but a judge of record (which a justice of peace is) can take a recognizance, because the acknowledgement of the sum is to remain as a matter of record. Every recognizance for the peace is expressly directed by the 3d Henry 7, to be certified to the next sessions. And, before the reign of James I, it was not imagined that security for the behaviour could be taken by one justice, and all the books in his time recommend two. Nay, binding to the behaviour, used always to be done in open sessions; and the best opinions now are, that a justice acts illegally, if he bind any man to his behaviour for any longer time than untill the next sessions of the peace. My Lord Hale says, " This binding, tho' expressed generally, and without any time limited, is not intended to be perpetual, but in nature of bail, viz. to appear at such a day at the sessions, and *in the mean time* to be of good behaviour."

Indeed, by supplicavit from the Chancery or King's Bench, a justice may be commanded to take surety for the good abearing, of any particular person; and then in obedience to the writ he must do so, for he acts only ministerially. The supreme courts, however, are commanded by " the 21st James I, to grant no process of the peace for good behaviour, but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be mentioned on the back of the writ; and if it shall afterwards appear that the causes are untrue, the court may order *costs to the party grieved*, and commit the offender till paid." This act is professedly by its preamble made to prevent surety for the behaviour being unjustly " procured upon oaths peremptorily and corruptly taken and upon false suggestions and surmises," which shews that it is only to be awarded after a solemn examination into the truth of the cause

cause suggested, upon strong and satisfactory evidence in open court, in the face of mankind.

What then must one think of any court of justice that shall, upon the caption of a man as a libeller, refuse to let him to bail before he has entered likewise into recognizance for his behaviour, and even that without limit of time? An aspiring Attorney-general, at the instigation of a peevish and suspicious minister, may charge any paper as a libel, and any man as the author or publisher, *ex officio*, without oath or the shadow of legal proof! The information may be filed, process taken out and executed, and the supposed libeller obliged to become bound in a heavy sum for his good behaviour, without stint of time; and yet the information may never be tried, or withdrawn, nor the recognizance released! Nay, if the same person should afterwards be guilty of any petty constructive misdemeanor or breach of the peace, it might be pretended that he had forfeited his former heavy recognizance; so that he would be punished, not in proportion to his real transgression, but to one that was only supposed: and This in a country where the law presumes every man to be innocent until he be found guilty! In plain words, it is a libel on the constitution to hold such doctrine, and in a judge, a breach of his trust (not to say high treason) to support it. It would render every English subject, by possibility, a most miserable fettered slave. Mr. Selden knew well the contrary, and therefore suffered himself to be reimprisoned rather than submit to so lawless a demand of the crown, as that of surety for his behaviour, and thus in his own person to afford a precedent or sanction for what might afterwards be attempted against others of his fellow-subjects. He was a great lawyer and a true representative of the people in parliament, in opposition to the tyrannical procedure of an arbitrary court and its subservient judges, that would have held every man *in misericordia regis*, if they could.

Having seen what the words of the statute, creating this power are; let us now look at the commission for the peace framed in consequence of it: premising that no usage, royal proclamation, or exposition of a judge, will make law in this case, that is not warranted by the express words of the statute, and that the same being a penal statute it must be construed strictly.

The

The clause in the old commission of justices of the peace, authorizing them to take surety of the peace or good behaviour, confines the same to actual breaches of the peace, that is, threats of bodily injury, or the burning of their habitations, and is in these words, “ ad omnes
 “ illos qui alicui de populo nostro de *corporibus suis*; vel
 “ de *incendio domorum* suarum minas fecerint, ad suffi-
 “ cientem securitatem de pace vel de bono gestu, erga
 “ nos & populum nostrum, inveniendam, &c.” And the words settled in James the 1st’s time and now pursued, are, “ To keep, and cause to be kept, all ordinances and
 “ statutes for the good of the peace, &c. and to chastise
 “ and punish all persons that offend, according to the form
 “ of those statutes and ordinances; and to cause to come
 “ before you all those, who to any of our people *con-*
 “ *cerning their bodies*, or the *firing of their houses*, have
 “ *used threats*, to find sufficient security for the peace or
 “ their good behaviour, towards us and our people; and,
 “ if they shall refuse to find such security, then them in
 “ our prisons until they shall find such security to cause to
 “ be *safely kept*. We have also assigned you to *inquire*
 “ *the truth more fully* by the oath of good and lawful men,
 “ &c. of all those in companies against our peace,
 “ in disturbance of our people, have gone or rode, or
 “ hereafter shall presume to go or ride; and also of all
 “ those who have there lain in wait, or hereafter shall
 “ presume to lie in wait, to maim or cut or kill our
 “ people.”

Now, this commission is grounded evidently on the statute of Edward the 3d, derives its force from it, and needs no comment to apply thereto the several parts of it. It confirms abundantly the doctrine I have advanced. Indeed, the legality of requiring surety of good behaviour for Arson, seems very questionable, as not comprised within the act. However, nobody will object to it, as being a security against being burnt in one’s bed, by any man who shall threaten, or, by lurking about the house at night, shall indicate an intention of so doing. It is most certain, nevertheless, that surety for the peace or the behaviour could be demanded in no case whatever at common law, before conviction, that it springs wholly from statute law within time of memory, and that the statute authorizes it only in cases of real personal danger; where-

fore it may very well be doubted upon what legal bottom it can be extended farther. In the reign of Edward the 4th, it was determined, that it ought not to be granted to a man who shall demand it because he is in fear that another will take and imprison him ; by reason that he may have a writ de homine replegiando, or an action of false imprisonment whereby he may be repaired in damages. This may be too strict a construction. But it is a proof that our ancestors thought the statute ought to be strictly construed, and that surety of the behaviour was only to be had as a protection from bodily maiming or destruction, indicated and proved by threats of immediate injury, by the wear of dangerous and forbidden arms, or by wandering and lurking about highways, and other suspicious places, in a suspected manner. It has been resolved that this security cannot be demanded for fear of harm to servants, cattle, or goods ; altho' a servant may demand it for himself in his own person like any other man : and it is never to be awarded by any magistrate but upon credible oath, or upon his own view, of a sufficient cause. My Lord Coke says expressly, that " slanderous words are not " a breach of the behaviour, for tho' such words are " motives and *mediate* provocations for breach of the " peace, yet tend they not *immediately* to a breach of the " peace, like a challenge, &c." Many strange discretionary deviations, however, from the words of the statute, have been made and upheld with forced constructions by judges, in the flux of time ; untill, in the latter end of James the 1st's reign, it came to be asserted by Mr. Dalton, in his book, that surety for the behaviour could be demanded of libellers. I presume, however, he must mean for such a libel on some particular person as directly and immediately tends to provoke him to fight ; for, I believe, it has been reserved to our day, and to the complement of crown-law by Serjeant Hawkins, to have it maintained either in print or at the bar, that such surety can be required for any public libel, or for a libel on any particular person not directly tending to an immediate breach of the peace. Be this as it may, the position is not warranted by any act of parliament, and is therefore absolutely illegal.

It has been resolved " That sedition cannot be committed by words, but by public and violent action."

" And

And my Lord Coke himself (the introducer, fosterer, maturer and reporter of the present star-chamber doctrine about libels) relates “ that in the 30th of Q. Elizabeth, “ one King with sureties was bound by recognizance to “ appear at the next sessions and in the mean time to be “ of the good behaviour. That he appeared and was in- “ dicted for slanderous words spoken,” *since his binding*, to a squire, namely, *Thou art a peltier, a liar, and has told my Lord stories*, and for *breaking and entering the squire’s close and chasing and vexing his cattle*, and for calling him afterwards *a drunken knave*. That the indictment was removed afterwards into the King’s-Bench, and there it was debated divers times both at the bar and the bench; whether, admitting all that is contained in the indictment to be true, any thing therein was in judgment of law a breach of the said recognizance. And that it was resolved “ neither any of the words, nor the trespass were any “ breach of the good behaviour, for that none of them “ did tend immediately to the breach of the peace, for “ tho’ the words *liar and drunken knave* are provocations, “ yet tend they not immediately to the breach of the “ peace, as if King had challenged the squire to fight “ with him, or had threatened to beat or wound him, “ or the like, for these tend immediately to the breach “ of the peace, to a trespass on the person, and there- “ fore are breaches of the recognizance of the good be- “ haviour.”

“ Surety of the peace also (according to some great “ authorities) is not to be granted, but where there is a “ fear of some present, or future danger, and not merely “ for a trespass or battery, or any breach of the peace “ that is *past*; for, this sort of surety is only for the secu- “ rity of such as are *in fear*.”

Dr. Burn, after giving a succinct and clear history of the several extensions of the sense of the statute, case after case, and reign after reign, with striking propriety remarks, that “ one great inlet, to the larger and at length almost “ unlimited interpretation of the words, was an adjudica- “ tion in Henry the Seventh’s time, That it was lawful “ to arrest a man for the good behaviour, for haunting a “ suspected bawdy-house, with women of *bad fame* ;” and concludes with the following judicious reflections : “ Thus the sense of this statute has been extended, not

“ only to offences immediately relating to the peace, but
 “ to divers misbehaviour not directly tending to a breach
 “ of the peace; insomuch, as it is become difficult to
 “ define how far it shall extend, and where it shall stop.
 “ Therefore, the natural and received sense of any statute
 “ ought not to be departed from without extreme neces-
 “ sity; for, one concession will make way for another,
 “ and the latter will plead for the same right of admission
 “ as the former.”

Let the legislature interpose therefore, when they shall think fit, and see the public safety requires it; but, I hope, no crown Judge will ever presume, for the future, to do more than *jus dicere*, and not *jus dare*. Every day makes one more sensible of the wisdom of *Aristotle's* counsel in making laws “ *Quoad ejus fieri possit, quamplurima legibus*
 “ *ipsis definiantur, quam paucissima judicis arbitrio relin-*
 “ *quantur.*” If Judges are not bound fast with chains of laws, customs, ordinances and statutes, it is impossible to divine what a servile Chief Justice may not one day give out for law, to gratify the spleen of an anxious, conscience-stung, and detected minister*. And such a horror have I, particularly, of the introduction of any new criminal law into this country, that, were it to happen, rather than submit thereto, I should be even for accompanying a noble Law-lord to *Ultima Thule*, which, by the shiver he spoke it with, I guess must be Scotland, the very northern scrag or bleakest barebone of the island. A man would fly any where in such case.

At the end of the first paragraph in page 37, add the following :

And “ it would be (as Hawkins says) extremely hard,
 “ to leave it to the discretion of a common officer to arrest
 “ what persons, and search what houses he thinks fit:
 “ and if a Justice cannot legally grant a blank warrant for
 “ the arrest of a single person, leaving it to the party to
 “ fill it up, surely he cannot grant such a general war-
 “ rant, which might have the effect of an hundred blank
 “ warrants.”

* Whoever is inclined to enter fully into this important part of the law, *Surety for the behaviour*, should consult Marrow, Crompton, Lambard's *Eirenarchy*, Pulton de Pace, Fitzherbert's and Burn's Justice, &c.

At the end of the second paragraph, in page 48, add the following :

L. C. J. Hale lays down these rules, as to warrants to search for stolen goods, “ (1.) They are not to be granted
 “ without oath, made before a Justice, of a felony committed, and that the party complaining has probable
 “ cause to suspect they are in such a house or place, and
 “ do shew his reasons for his suspicion ; and therefore a
 “ general warrant to search all suspected places is not
 “ good ; nor are general warrants dormant, justifiable,
 “ nor do they give any more power to the officer or party,
 “ than what he had without them. (2.) It is fit to express that search be made in the day-time. (3.) They
 “ should be directed to constables, and not to private persons, though the person complaining should be present,
 “ because he knows his goods. (4.) It ought to command that the goods found, together with the party in
 “ whose custody they are found, be brought before some
 “ Justice of the peace.”

In page 92, line 28, after the word Law, add the following :

It would, however, be more injurious to liberty, to have any Chief Justice, contrary to the practice of his predecessors, narrow the great remedial act of Charles the 2d, to the single case of a commitment to prison, or restraint by a legal officer, for criminal or supposed criminal matter ; so that if I was restrained of my liberty, without the charge of any crime, by a man not pretending any authority of law for what he did, I should be without any immediate redress, if such restraint happened in the vacation-time. As for instance, if I was taken up by a Sergeant of the Guards with a file of soldiers, on a verbal order from a Lord, Groom, or Page of the Bed-chamber, without any cause assigned, and hurried away to the Savoy, or to a ship at the Nore.

In page 95, instead of the last paragraph (of the text) and the last but one, read the following :

Or, if any Chief Justice, with a view to the introducing a spirit of arbitrary and discretionary determination in courts of law, under a specious pretence of equity, should
 from

from the seat of justice declare he desired to hear of no case that was determined above 50 years ago.

Or, if any Chief Justice should, by solemn but unnecessary givings out from the Bench, endeavour to blast the repute of Juries with mankind, by pronouncing that the trial by jury would be the very worst of all, were it not for the controuling power of judges, by the award of new trials and the reconsideration of verdicts, and that, indeed, it could never have subsisted had it not been for such controul, by reason of the want of capacity in jurors, and the changes of the times.

Or, if any Chief Justice should arrogate to himself at *Nisi Prius*, the separate provinces of Judge, Council and Jury, by cutting short the one, and imposing his own sense of things upon the other, and if, upon any occasion, a verdict contrary thereto, was persisted in to the last, should imperiously and unconstitutionally demand of the jurors their reasons for the same ?



ADDITIONS

TO THE

THIRD EDITION,

TO WHICH

All the Pages mentioned refer.

In page 8, instead of the line, from 27 to 33, read the following.

THAN the common, regular information, which, by virtue of a statute ~~passed~~ soon after the revolution, can not now be ~~filed~~, for any trespass or misdemeanor, without express order of the King's Bench, and the Informers entering into a recognizance to pay costs to the Defendant if acquitted upon the trial, or if such informer do not proceed within a year, or procure a *Noli Prosequi*. The Attorney General, however, informing *ex officio* never pays any costs: so that he may harass the peace of any man in the realm.

Instead of the last line in page 48, and the first line in page 49, read the following:

And yet, as I take it, although the Privy Council, as a board, have constantly exercised this power, no single Privy Counsellor, nor any number of Privy Counsellors not met in Council as a Board, can pretend to such a Power. Be this as it may, the being a Privy Counsellor
or

or Secretary of State, does not make a man a Justice of Peace, and more authority or jurisdiction no Secretary ever claimed. To render him so, it has, &c.

At the bottom of page 100 add the following :

He does not wish to have his subjects address him, in the language of Divinity, as *most adorable*, or to have them vow a *whole life of devotion* to him.



A
D E F E N C E
O F T H E
M A J O R I T Y
I N T H E

H O U S E o f C O M M O N S ,

O n t h e Q U E S T I O N r e l a t i n g t o
G E N E R A L W A R R A N T S .

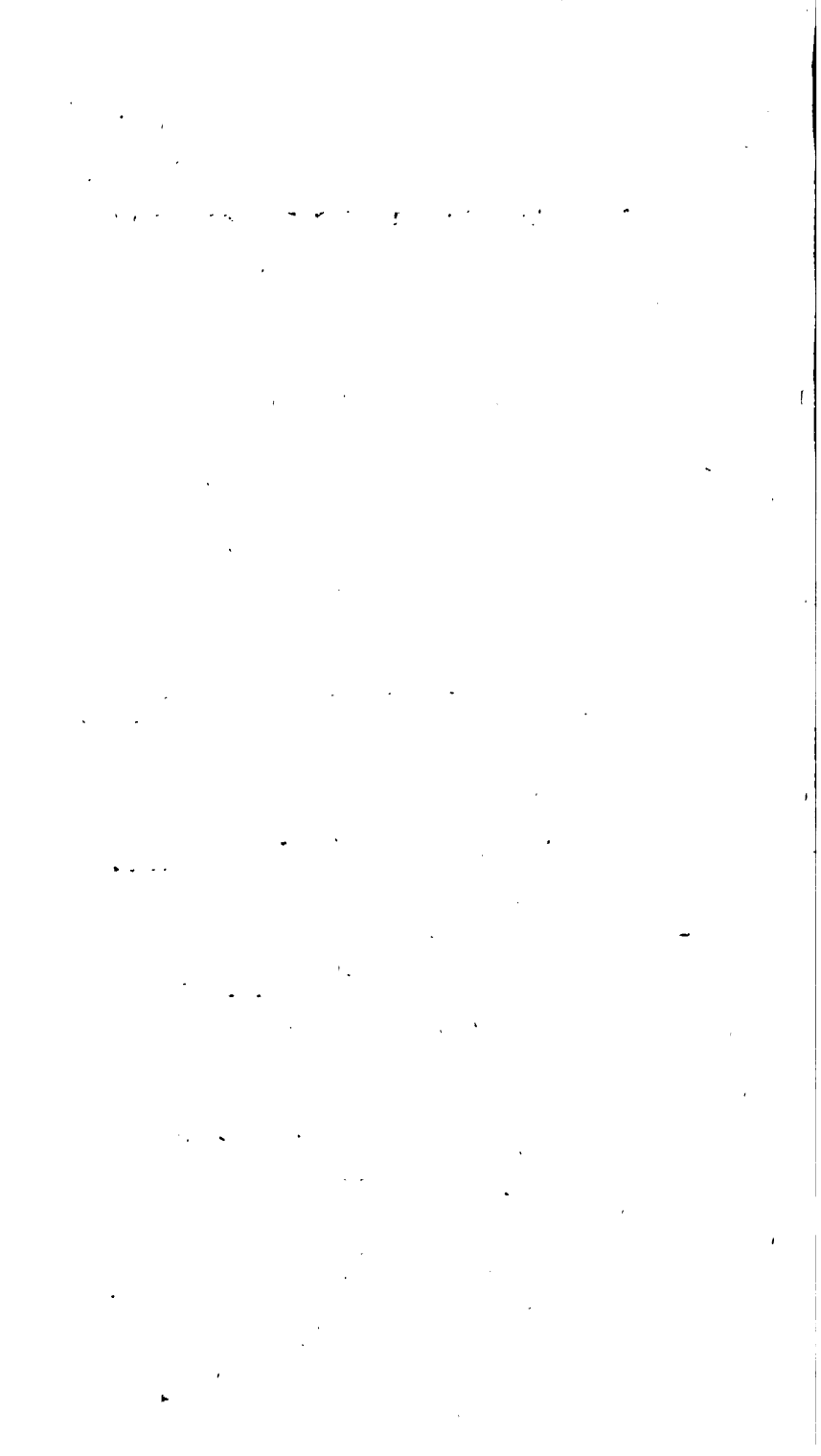
I n A N S W E R t o
T h e D E F E N C E o f t h e M I N O R I T Y .

T h e S E C O N D E D I T I O N ,

T o w h i c h i s a d d e d ,
A P O S T S C R I P T , i n A n s w e r t o T H E E N Q U I R Y
I N T O T H E D O C T R I N E O F L I B E L S , &c. a n d T H E
R E P L Y T O T H E D E F E N C E O F T H E M A J O R I T Y .

L O N D O N :
P r i n t e d f o r J . W I L K I E , i n S t . P a u l ' s C h u r c h - Y a r d ,

M D C C L X V .





A
D E F E N C E
O F T H E
M A J O R I T Y.

THE Defence of the Minority
is writ with a Spirit and Elo-
quence of Stile which suffi-
ciently distinguishes it from the vulgar
and ordinary Productions of Party
Writers. It is superior to the low Scur-
rility and personal Acrimony which of
late have supplied the want of Argu-
ment, Fact and Conviction; but which
do not therefore become by any means
less acceptable to a Class of Admirers,
who are apt to mistake the Virulence

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of Abuse for Wit, and the Malignity of Envy for a disinterested and generous Independance. It contains, however, an Appeal to the Feelings and Understandings of Mankind; and submits the Conduct of Two Hundred and Twenty Gentlemen to the Decision of the Public. In this Light, I have a Right in common with every other Man to enter freely into the Discussion of it, and to express my Censure or Approbation of it, together with the Reasons that influence my Opinion. This I am the more readily inclined to do, as it is too bold in its Assertions, and too plausible in its Argument, not to deceive many who, though not naturally inclined to think ill of Ministers only because they are Ministers, have not the Means of obtaining that Information which is necessary to confute artful and fallacious Representations, contrived to seduce
their

their Affections, and to mislead their Judgments. It is to such only that I address myself; for as to those who are under the Influence and Prejudice of Party, I by no means expect to gain their Attention, much less do I attempt their Conviction: Time and the Experience of themselves and others will do that by Degrees which no Arguments can effect; the well-intentioned will sooner or later return to their natural Biass, and the others will become, at length, the Dupes and Victims to their Avarice or Ambition.

I shall make no Difficulty to begin by declaring that I am neither the Author of the Letter alluded to, nor do I know who the Author is: I have never read the Thing itself, nor from the Idea I have now conceived of it, do I desire to read it. As I am not interested therefore in justifying that Paper, I shall content myself with making

only some general Observations upon the Work before me, which I shall endeavour to do with Fairness, Truth and Sincerity ; and by endeavouring to state Facts and Transactions as they really are, shall undertake the only effectual Defence of the Majority.

The Defender then sets out with arraigning the Candour, and attacking the Credit of the Writer in the *Gazetteer*, for having mis-stated and misrepresented the Motion made in the House of Commons, viz. “ Whether a General Warrant from a Secretary of State be warrantable by Law or not.” In order to prove this a Misrepresentation, he tells you he has been at the Pains of transcribing the Motion out of the Votes, and gives it you as follows: “ That a General Warrant for apprehending and seizing the Authors, Printers, and Publishers of a seditious Libel, together with their Papers, is
not

not warranted by Law." This he represents as formed upon the *single Case before them*; upon this he every where states his whole Argument. What shall we say now of this Author's Candour, if we find upon Examination that he has himself mis-stated the Motion; that the Motion, as he has given it, was by the House adjudged to be so little formed upon the single Case before them, at least so little equal to the Case before them, that they found it necessary, in the Course of the Debate, to alter and amend it for that very Reason, by common Agreement of all Parties? The Author has transcribed the Motion as it was made upon the 14th of *February*; he will give me Leave to transcribe it as it stood amended on the 17th, to which the Debate had been adjourned; which I have my Reasons for inserting, as he had doubtless his Reasons for omitting it: " That a
General

General Warrant for apprehending and seizing the Authors, Printers, and Publishers of a seditious and *treasonable* Libel, together with their Papers, is not warranted by Law ; *although such Warrant hath been issued according to the Usage of Office, and hath been frequently produced to, and so far as appears to this House, the Validity thereof hath never been debated in the Court of King's-Bench, but the Parties thereupon have been frequently bailed by the said Court.*"

Thus stood the Question, as amended by the Consent of those who moved it ; it was therefore such as they had adopted ; it was the only Question under Consideration of the House, when they voted to adjourn it for four Months. The Public will judge how fairly it has been represented by the Defender of the Minority. I will only observe, that it was so altered, in order

to give the Public a true Idea of the Case upon which this Question was agitated; that the Warrant of Lord *Hallifax* was not for a seditious, but for a *seditious* and *treasonable* Libel; and that the Circumstance of having admitted to Bail Persons apprehended under such Warrants, instead of giving them their full Discharge, is of so much Importance to the Question of the Legality of the Warrants, that in the Opinion of an old, experienced and able Lawyer upon that Occasion, who will ever be esteemed an Honour to the Profession, it implies no less than an Imputation of Perjury, to suppose such Practice to have prevailed in the Court of King's Bench, unless the Legality of the Warrants had been at the same Time acknowledged by that Court.

The Public being thus in Possession of the true State of the Question itself,

I now

I now proceed to examine the Reasoning of the Defender upon the Question.

Had the Motion been general, as stated by the *Gazetteer*, "Whether a *General Warrant* from a Secretary of State be warrantable by Law or not? it seems the Author is of Opinion, that it would have been such, as a thinking and honest Man might very fairly and consistently have voted *against*, though he had voted *for* the Motion limited only to the Case of seditious Libels." I most readily agree with him, that the two Propositions are highly different; as different as an honest Zeal for the Liberties of the Subject (though perhaps, in my Judgment, as well as that of the Defender himself, a mistaken one), and a captious and partial Pretence, calculated to serve no Purposes but the Purposes of Party; to amuse the Public with the Sound of Liberty; to obtain, under that specious Plea,

Plea, a larger Division in Parliament ; and by an *ex post facto* Resolution, that could extend to reach no further than to a particular and recent Instance, to squint a Censure of Blame, Oppression and Innovation upon the uninterrupted Practice of Office, justified by Precedents produced from the Time of the Revolution, reaching back perhaps to the remotest Times, and combined with the very Essence of Government. The two Propositions are so different to my Apprehension, that the one takes away from the executive Power, an Authority which may frequently be found essential to the very Being of the State; the other is merely trifling with the Public, by professing to give them a Security to their Liberties, when, in Fact, no such Security was intended *.

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It

* It may not be amiss to observe, with regard to the *modern Practice* of this *modern Office*, that the
Office

It should seem as if seditious Libels were considered by the Gentlemen of the Minority as a Sort of harmless Sport, a mere Exercise of Wit and Talents, and an innocent Exertion of the Liberty of the Press. Perhaps they may stile this very Libel, upon which their Complaint is founded, *an irreverent Paper*, a *licentious Paper*; that the *unhappy Man* has gone rather into a blameable Excess; that they do not

Office is mentioned amongst the first Officers of State upwards of 200 Years ago, in the Act of Precedency 31st Hen. VIII. by which it is enacted, That the King's Chief Secretary should take place above all others of his Rank and Degree; and that though *the various Papers and Volumes of Record* which were brought to justify and confirm the Practice, were confined only to the Date of the Revolution, it should by no means be understood that it then took its Rise, having been frequently practised in former Reigns; but that Date was most especially chosen as the happy *Æra* of our Liberties being confirmed, and the Constitution established upon its present Foundation.

pretend

pretend to justify it.---Parliament has given it another Stile: It stands branded by their Resolution “ as a false, scandalous and seditious Libel, containing Expressions of the most unexampled Insolence and Contumely towards his Majesty, the grossest Aspersions upon both Houses of Parliament, and the most audacious Defiance of the whole Legislature; most manifestly tending to alienate the Affections of the People from his Majesty, to withdraw them from their Obedience to the Laws of the Realm, and to excite them to traiterous Insurrections against his Majesty’s Government.” Do such Attempts as these so little interest the Dignity of Government and the public Peace, as to require to be excepted by an express Vote of Parliament, and to be considered as *no higher an Offence against the State than the publishing a Libel?* Such are the Defender’s Words;

such the manner in which *these true* and *temperate Friends to Liberty* disclaim the Sentiments of that abominable Paper, which, if it had been adjudged to have excited, instead of tending to excite, would have been *no less* a Crime against the State than that of High-Treason, without any Palliation whatsoever.

Such then is the Tenderneſs and Concern of the Defender of the Minority, for the Peace and good Order of Government, and the public Security: Let us now examine, whether he has been more truly zealous in the ſecuring the Liberties of the Individual, and “ defending the undoubted and undisputed Birth-Right of the Subject.” The Motion, take it as it was moved by Sir *W. M——b*, and ſeconded by Sir *G. S——lle*, on the 14th, or as it ſtood amended in the adjourned Debate on the 17th, contains what? It contains

tains a Resolution of one House of Parliament, which therefore is only a Declaration of *their Sense* of the Law, not a judicial Determination of Law, which might be pleaded in a Court of Judicature, that a *General Warrant* for seizing Authors, Printers and Publishers of a seditious (and treasonable) Libel, together with their Papers, is not warranted by Law. This Resolution then would have been the only Medium that could be found; the exact and precise Remedy to the Evil complained of; which, “ *without stirring captiously so delicate a Question of Government*, as that which they are with so little Candour charged with,” would have been sufficient to have quieted the Fears that had been so industriously infused into the Minds of Men upon this illegal and arbitrary Proceeding. Let us see then what real Security this Resolution would have

have given ; and whether, with all the Care, Accuracy and Nicety with which it was drawn, the Censure of it might not possibly have been evaded by some future Secretary of State in similar Instances. If he granted the Warrants *general*, and for seizing *the Papers*, he would, I confess, stand condemned under this Resolution ; but suppose, as a possible Case, he should have granted a *particular* Warrant, describing the Person, for the seizing *the Papers*, and a *general* Warrant for apprehending the *Authors, Printers* and *Publishers* ; I would be glad to know whether either of these Warrants would fall under this Resolution ; or whether, if the Words treasonable Practices were inserted (and endeavouring to excite to Treason, I should suspect to be a treasonable Practice) whether, in that Case, a General Warrant might not pass uncensured, including
both

both the Persons and Papers. If these Evasions could indeed frustrate that Resolution, as I conceive they would, I hope I may be pardoned in having asserted, that this Resolution was offering a Security to Liberty, which these very Gentlemen themselves, if ever they should be so happy as to become Ministers, were left at full Liberty to frustrate and evade, as often as they should see Occasion, and would consequently amount, in Effect, to just no Security at all.

If the Liberty of the Subject be the only Object to be considered, and it is proved to be incompatible with General Warrants in one Instance, it is inconsistent with the same Warrants in any other. A future Minister may change a Word only in the Form, and subject us to the same Evil: Liberty demands that there should not be left a Possibility of Danger; if you grant

us no more, you grant us nothing. If, on the other Hand, the Safety of the public Weal, in which is included the Liberty of each Individual, ought to over-balance that Possibility (and Experience has proved it is only a Possibility) of Danger to the Rights and Liberties of the Subject; if that be the Sentiment, and I believe it was the Sentiment of every reasonable Man upon the Occasion,—— let us not amuse Mankind, and make that Exception only to our general Reasoning, which will give them no Benefit, and is, perhaps, of all other, the Instance the most dangerous to the public Quiet. I feel that in the present Temper of the Times, one is almost afraid to call any thing a Libel. Private Characters are at the Mercy of every nameless Scribbler: the most secret Anecdotes of Domestic Life are exposed, mistaken, misrepresented, by Men who
are

are Strangers to your Character, your Person, and almost to your Name. This, however, is a private Evil, and has this Remedy, that by degrees Abuse will lose its Poignancy, and Malice itself will be silent when she finds herself no longer attended to. But the Case of seditious Writings is of more general Mischief. It is the subtle Poison that creeps imperceptibly thro' every Vein; the Seed of Jealousy, Revolt, and Civil Discord; and is at least the Parent of Treason, if not the Offspring of it.

The next Thing the Defender of the Minority undertakes to lay before the Public, is the Proceeding of the Court of Common Pleas, which he complains has been as grossly misrepresented in the *Gazetteer*, as the Motion had been mis-stated. He asserts, with a very peremptory Decision, "that the Question of the Legality of the War-

rants is not now *sub judice*, nor has ever been in a Course of legal Determination." To prove this Assertion he has given Extracts in his Notes out of the several Bills of Exceptions, and endeavours to prove from them, " that the only Question *now* in legal Issue, or that can be brought before the Court, is, whether a Secretary of State be a Justice of Peace; I suppose he means within the Sense of the Act of the 7th of *James I.* and the 24th of *George II.* I would be glad to know, whether by the Words *now in legal Issue*, he would imply what he first asserts, that the Question of the Warrants never has been in Issue before the Court; or whether he means within the strict Sense of them, that in those several Bills of Exceptions the Parties have thought fit to rest their Appeal upon Lord *Hallifax* not having been made a Party to the Bill, without insisting

upon the Legality of the Warrants under which they acted.

In the several Causes brought before the Court of Common Pleas in Consequence of these Warrants, it is necessary to observe there are two different Complaints. The one is for having acted under an illegal Warrant, as in the Action by *Wilkes* against *Wood*, where the Legality of the Warrant is *the sole Thing in Issue*; in barr of which Action, Mr. *Wood* is advised by his Council to plead that Lord *Hallifax* was not made a Party, according to the 7th of *James I.* and 24th of *George II.* This Plea however is *over-ruled*; the Court proceed to determine the Cause, and actually give Damages to the Plaintiff; by which the Warrant stands condemned. The Bill of Exceptions is only in the Nature of an Appeal from this Decision. The other Ground of Complaint, as in the Action

brought by *William Huckell* against one of the Messengers, is twofold; for having acted under an illegal Warrant, and for having mistaken the Object of that Warrant, in apprehending one who was neither Author, Printer, or Publisher of the Libel therein specified. In this latter Instance it is evident that the pleading the Legality of the Warrants would be of no Effect; it is particularly expressed in the Bill of Exceptions quoted in the Note, "That such Seizure and Imprisonment were not made or done *in Obedience to the said Warrant*; nor had the said Defendants, or any of them in that Behalf, *any Authority thereby*. It was equally ineffectual to make Use of the other Plea in barr of the Action, viz. that Lord *Hallifax* had not been made a Party, since it was evident they had not acted under any Authority from him, not having acted *in Obedience to his Warrant*. It

was

was therefore determined, that *upon the whole Case* the *several* Matters so produced and proved were not sufficient to barr the said *William Huckell* of his Action. In this Cause therefore there were also Damages given; to which a Bill of Exceptions was taken. The Difference between these two Cases should be carefully distinguished. In the latter Case, the Legality of the Warrant was not properly perhaps in Issue before the Court: The Defendants stood condemned upon the very Face of the Transaction; it was necessary for them to prove that they had acted under the Warrant, before they could reap any Advantage from the Legality of it. In the other Case, how was it possible, in the Name of Common Sense, to come to any Determination upon the Merits of that Cause, without taking into Consideration the only Object

Object of it! Had the Court indeed admitted the Plea, mentioned in the Bill of Exceptions, in barr of the Action, viz. That Lord *Hallifax*, and those who acted under his Warrant, were entitled to the Benefit of particular Acts of Parliament, by which *alone* they would then have been entitled to a Verdict with Costs, they might indeed have avoided entering into the Merits of the Cause before them; but they rejected the Plea, they tried the Cause, and gave Damages for the Plaintiff. Damages for what? Because Lord *Hallifax* was or was not a Justice of the Peace? Because he ought not to have been made Defendant, where in Fact he was not made Defendant with them in that Action brought against them? What can the Author mean, or what can he conceive was in Issue before the Court when those Damages were given,
if

if the Legality of the Warrant was not before them * ?

So

* In order to give the Public a more full Idea of the Question, it is necessary to state the Acts of Parliament alluded to, concerning the Privilege of a Justice of Peace, by which they will perceive how little that could be made *the only Question is legal Issue.*

By the 7th of *James I.* if any Action be brought against a Justice of Peace for any Thing done in his Office, he may plead the general Issue, and give the special Matter in Evidence ; *i. e.* he may plead Not Guilty to the whole Charge, and justify himself upon the special Matter, or the peculiar Circumstances of the Case.

By the 21st of *James I.* such Action shall not be laid but in the County where the Fact is committed.

By the 24th of *George II.* no Writ shall be sued out against a Justice for any Thing done by him officially, without Notice in Writing given a Month before the suing out the same, containing the Cause of the Action, indorsed with his Name and Place of Abode ; for which he shall be liable to the Fee of One Shilling, and no more : and unless it shall appear that such Notice was given, the Justice shall be entitled to a Verdict and Costs. The Justice may, at any Time within one Month after such Notice, tender Amends to the Party complaining ;
and

So much for the Matter of Fact concerning the Proceedings in the Court of Common Pleas, which I have been the more tedious in explaining, as the

and if it shall appear that he has offered sufficient Amends, he shall recover a Verdict and Costs. No Evidence shall be admitted for the Plaintiff, on trial of any Cause of Action, except such as is contained in the Notice. No Action shall be brought *against any Constable, or other Officer, acting in Obedience to the Warrant* of a Justice of Peace, until Demand hath been made by the Party, in Form, of the Perusal and Copy of such Warrant, and the same has been refused or neglected for the Space of six Days after such Demand: and if, after obtaining such Copy, an Action be brought without making the Justice Defendant, the Jury shall give the Verdict for the Defendant, on the Warrant being produced and proved, notwithstanding any Defect of Jurisdiction in the Justice. If such Action be brought against the Justice and Constable jointly, on proof of such Warrant, the Jury shall find for the Constable: and if Verdict be given against the Justice, the Costs recovered by the Plaintiff shall be taxed by the proper Officer, so as to include such Costs as the Plaintiff is liable to pay to such Defendant, for whom such Verdict is found.

Defender

Defender of the Minority seems to lay so great a Stress upon that Part of his Argument. I will now proceed to apply this Reasoning to the Conduct of the Majority, who stand accused of having had Recourse to this *fallacious* Argument, to avoid determining this great and important Question. After what has appeared in the foregoing Pages, I flatter myself the Reader will think there was some reason to enlarge upon "the Impropriety of deciding in Parliament, a Question then depending in a Court of Judicature;" they may be inclined, perhaps, notwithstanding the contrary Assertions, to acknowledge that the Question was then depending; nay, that it has since been actually decided in a Court of Judicature. If it had not been in Issue, it is evident it was in the Power of any one of the Parties acting under that Warrant, to have brought it into Issue at his Op-

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tion;

tion; and that Argument alone would have been sufficient to evince the Impropriety of the Interference of Parliament, unless where the Necessity of some peculiar Circumstances had absolutely required their Interposition. What then, says the Defender, has Parliament never proceeded to examine into Abuses by a Motion in either House, to express the Sense of that House by a general Resolution, and upon that Resolution *to bring in a Bill?* Have they forgot the Case of Lord Chief Justice *Keeling*; of Lord *Danby*; of Lord Chief Justice *Scroggs*; and of Lord *Marlborough*? “which if not thought apposite each separately to every Point, yet in the whole, and taken together, is conclusive to every material Circumstance in the Proceeding of last Year?” No: the Defender may be assured those Cases are not forgot; but though this kind of collective

Precedent

Precedent may be very conclusive to our Author, and to the Gentlemen of the Minority; yet he will pardon me, if I confess I am unable to perceive how these Instances, which taken separately are most certainly nothing to the Purpose, can when bundled together become apposite to the present Question. Two of the Cases regard the Supreme Judges of a Court of Judicature; one wantonly abusing his Authority, and perverting the Law to the Purposes of Vexation and Oppression; the other pleading Usage indeed for a Practice, which was dangerous to the Safety of the Subject, but which was by no means justified by the Necessities of the State: both so far from being in a Course of Trial, that they were amenable to no Court or Tribunal, but to the great Source and Guardians of our Law, the High Court of Parliament assembled. The two other

Cases, the one is a Case of High Treason in Lord *Marlborough*, suspected of aiding and abetting the King's Enemies; a Case which, as well as that of Lord *Brooke* and the Earl of *Warwick*, in 1640, on Suspicion of corresponding with Rebels actually in Arms within the Kingdom, if I understand any thing of the Author's Reasoning, he does not himself wish to except from the Power of General Warrants: the other is the Case of Lord *Danby*, a Member of the House of Commons, who at the Request of his Father was apprehended by Lord *Nottingham*, without any Colour of a Crime alledged, and merely from private Family Considerations. How any, or all of these Instances, can be applied to the present Case, I am at a Loss to imagine; not one of them in a Course of legal Determination, two of them exempted from any ordinary Course of

of Law, and the other two Cases differing essentially in their Nature from the Case in Question.

The Defender of the Minority, upon the Strength of these Precedents however, such as they are, and upon his Representation of the Proceedings in the Court of Common Pleas, triumphs not a little; and imagining this to be the *Fort* of his Argument, boldly asserts, “ that *the whole Defence* of that Day consisted in arguing upon the Impropriety of deciding in Parliament a Question then depending in a Court of Judicature.” I trust I have said enough to induce my Reader to be of Opinion, that had there been no other Argument made use of against so hasty a Resolution, it would alone have been sufficient, unless out-weighed by some very important Necessity. But, under Favour of the Defender, I can by no Means agree that the whole
Defence

Defence of that Day did turn upon that Point alone. . I will take Leave to refresh his Memory with some of the principal Arguments which I conceive to have determined the Majority upon that Question. In the first Place, the little Necessity there appeared at that Time of examining into a Power, which could not be decided but with the utmost Gravity and Deliberation, which had the Sanction of uninterrupted Usage, and which did not appear in the present Instance to have been abused, since it had not been made use of to entrap or entangle Innocence, but manifestly with the Intention of discovering and bringing to Punishment a daring and dangerous Offender. The Insufficiency and Futility of the Proposition, which might serve to alarm the Jealousies, but could not secure the Liberties of the Subject; whilst a Resolution upon the Journals, confined to

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the Case of seditious Libels only, left the Warrants, in all other Cases, still more confirmed and authorised by that tacit Approbation. That the Case of seditious and treasonable Libels was so far from deserving to be a particular Exception, that there are few Instances that more strongly justify the Necessity of the Practice. That if the House of Commons should be prevailed upon to pass their Censure upon such Warrants, by their Resolution, and if afterwards the Lords, when appealed to in their judicial Capacity, from the Decision of the Courts below, should think fit to confirm the Practice, and to declare the Legality of them, one of these two things must happen; either the Courts of Law must be divided and confounded in their Opinions, or the Dignity of the House of Commons must suffer in the Neglect and Contempt of their Resolution. That if
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the House thought proper to take Cognizance of General Warrants at all, and to discuss the Legality of them, it imported them to go further, to probe the Evil to the Bottom, to examine it with all the Solemnity so great a Question demanded, to form the whole into a Law, which should henceforward be an effectual Security to our Freedom, and an unerring Guide to all future Ministers, in the Exercise of a very dangerous discretionary Power. That in order to this, it would be necessary that it should be brought before the House, in the Form of a Bill for regulating the Conduct of the Secretaries of State in all Cases ; that in this Form it might be duly weighed in the several Stages of the Bill ; the Parts of it, and possible Cases, thoroughly considered ; and that when it was perfected, it might be determined, not by the hasty, and if I may be permitted

to

to say so, the ineffectual Resolution of one House, but that it might receive the solemn Sanction of the Legislature, and pass into a Law.

These were among the principal Arguments that were urged against the Motion, and which occasioned the Vote by which the Consideration of it was postponed for four Months. Whether they have any Force or not, Mankind will judge; and if they are seriously attended to, I need not fear their Decision.

With regard to the Bill brought in by Sir *John Philips*, in Consequence of his Engagement for that Purpose, it is very well known, and indeed it did occasion some Surprise, that it was received by the Gentlemen of the Minority with the strongest Degree of Prejudice and Disgust. Their Reasons for it they best know: certain it is they did not then assign the Reason given

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by

by the Defender; they did not then seem afraid to bind the Faculties of Government too tight, and to gain more to the Cause of Liberty than they desired. But it seems they could not *regulate* what they did not allow *to exist*. What wretched quibbling upon Words! They could endeavour to regulate the Conduct of Secretaries of State, by an ineffectual Resolution of one House; but when it was *offered them* to regulate the Practice effectually, by a Bill *founded on the Words even of their own Motion*, if they had disliked that of Sir *John Philips*, they could not consent to regulate what they did not allow to exist. They had calculated their Resolution to such a Nicety, that *that* only was Security to Liberty; the Alteration of an Iota in Matter or in Form frustrated their Intentions for the public Welfare.

The Defender of the Minority indeed has had Recourse to one Method of gaining the Public on his Side, which he will permit me to say is neither fair nor judicious, since with whatever Art and Skill it may have been practised, the Fallacy of it appears too openly to have any Effect upon an unprejudiced Reader. He has supposed an Instance, which he had no Cause to suppose, of Grievance and Oppression; he has drawn a Character in the most flattering Colours, whether real or fictitious he best knows, to engage the Affection of his Reader: he applies that Character to a Writing which, give me Leave to say, suits as little with it as Falsehood and Misrepresentation do with Candour and Integrity, or Blundering and Ignorance with Knowledge and Ability: And he then supposes that which has never yet been called a seditious or treasonable Libel,

to be treated as a seditious or treasonable Libel; he heightens his Picture with every Circumstance of Allusion, of Sacks, and Papers, and Messengers, and then sets himself to argue upon what—upon the Phantom of his own Imagination. What is this but trying to alarm our Passions, when he fears he has not yet convinced our Reason. A Secretary of State, as any private Subject may do, may violate the Laws of his Country, may be guilty of Oppression and Injustice; but if he does it, he does it *at his Peril*; the Times are not likely to wink at Violence: till a Minister has been proved guilty of Injustice, we have no Right to apprehend it from him; when he stands convicted of it, there are Laws that will know how to reach him. On the other Hand, when the Author of the *Budget*, be he whom he will, chuses to amuse himself with writing treasonable and
seditious

sedition Libels against the Peace and Quiet of the State, the State will take Cognizance of him, I make no doubt, as of any other common Offender. So long as he confines himself to political, but lawful Disquisitions, personal Indecency and contumelious Expressions, will, I trust, be forgiven him, and will be attributed to some Writer whose Acrimony flows from a Heart consumed with Envy, Spleen, Conceitedness and Self-Importance, from one who has been taught to think himself a Statesman, and who would be too happy to be able to think himself a Minister.

The Public have now before them the Arguments on both Sides, and I should not hesitate to make my Appeal to them, if they could receive an Appeal, where Parliament has already given its Decision. They have, perhaps, expected to hear from the Defender a
regular

regular and alarming System laid open to them, by which an arbitrary Administration had endeavoured to overthrow the Bulwark of their Liberties: that the *Privileges of Parliament* had been daringly violated; that some dangerous *Innovations* had been attempted to annihilate *Magna Charta*, the *Habeas Corpus*, or some other Pillar of the Constitution: in short, that *some innocent Man* had been oppressed by arbitrary Violence, Tyranny, and Persecution. This indeed might justify the Language that has been held, and the Spirit which has been endeavoured to be infused into the Nation.—What will they find as the Object of so much Alarm and Jealousy? An Administration vindicating the Dignity of the Crown, the Authority of Parliament, and the public Peace and good Order of the State. Not innovating, not proceeding with Haste or Violence,

but submitting their Judgments to the Practice of their Predecessors in Office; exerting such Powers only as had been established by repeated Usage, which had frequently appeared before Courts of Judicature, had never been questioned in them, but by the Practice of those Courts had been acknowledged and confirmed. Powers, which the best Friends to Liberty had never scrupled to exercise, and which the most violent Assertors of regal Authority had never dared to abuse: They will find the Object of the Complaint such as even Party is *become ambitious* of disclaiming; and the Offence of so public and so heinous a Nature, that Parliament has passed upon it unanimously the severest Censure. Where then is the Grievance, where then is the Foundation of so much Clamour? Have the Officers in the Execution of these Warrants undesignedly mistaken the Objects
of

of them? Will the Parties aggrieved deny that they have had ample Satisfaction? Have they ignorantly exceeded the Powers of the Warrant in a single Circumstance? If they have, the Law is open; no Minister desires to screen them from the Law; the Law knows how to punish and redress. What then does the whole Charge amount to? It amounts at last to this single Proposition; that they did not suffer themselves to be the Dupes of a Party, in acquiescing in a Resolution that they thought neither conducive to private Liberty, or consistent with public Security.

After all that has been said, is it possible for me to dismiss my Readers, without lamenting, most seriously lamenting, the unhappy Temper of the Times? Exhausted by a bloody and expensive War, not to make Use of peevish or harsh Expressions, which
may

may point out, but will not remedy past Evils; burdened with grievous but necessary Taxes at Home; hated and envied for our Successes abroad; with an Ambition murmuring that we possess no more, yet perhaps unable to maintain or occupy what we possess; threatned with Evils, which our united Strength can scarce avert, and which our domestic Discord may too quickly hasten; in this Situation, is it a Time for private Jealousies, private Discontents, and private Interests to consume the Interval that Peace affords us! Is this a Time to refuse Assistance to the Public, and to endeavour by every Artifice to frustrate the Assistance which is offered to it by others? To sow the Seeds of Diffidence and groundless Apprehension; to encourage Murmurs, and to excite Resistance against Parliamentary Impositions? To divide again the united Kingdoms? To revive the

Distinctions of Party; wantonly to sound the Alarm of Privilege and Prerogative, of Whig and Tory, when the Wisdom and Goodness of the common Father of his People had perfected the happy Union of his Subjects?——If there are any amongst them who are not quite devoted to the cry of Faction; *who are yet sensible to the Feelings, and open to the Call* of their Country; let them in time respect her Distresses; suspend, at least, their Discord and Ambition; disappoint the Malice of our Enemies; confirm the Glories we have acquired; and no longer endeavour, by the Treachery of intestine Divisions, to accomplish what the united Powers of *Europe* by open Force have in vain attempted. For once let a true Public Spirit prevail over Interest, Prejudice, and Passion, and unite, for a Time at least, the *inconstant Patriots* of this *inconstant Country*.

P O S T-



P O S T S C R I P T.

THE Author of the foregoing Sheets having been induced to take up his Pen against the Defender of the Minority, from the peculiar Marks that distinguish that Performance from the other innumerable Productions of the Party; does by no means think himself bound to enter the Lists with every dull, tedious, illiberal Writer, that thinks fit to treat the Subject of General Warrants. It would be indeed endless, as well as a Task too irksome, if he were obliged to read, and take into Consideration, every thing that may be detailed upon the old beaten Ground. *Liberty, Constitution, Magna Charta, the Habeas Corpus, and the Revolution*, are Words which, if they were less frequently sounded, would probably be more strongly felt, and more duly revered, by Men of all Descriptions. These Gentlemen, on the contrary, seem so vigilant to

keep up the Alarm, they seem so much delighted with their own Clamour, they are so loud and at the same time so empty, that by teizing us for ever with groundless Apprehensions, they will at last dull our Sensibility upon the most tender of all Objects: When there is real Danger to our Liberties, we shall scarce persuade ourselves that the Wolf is at the Door.

I have before me a most elaborate Performance of this kind, which calls itself *An Enquiry into the Doctrine of Warrants, &c.* in the small Compendium of 135 Pages, and professes to have a *View to the Defence of the Majority*. I am most heartily sorry, for my own sake, as well as for the Author's, that any thing I may have dropt in that Pamphlet should have occasioned him so much Trouble. I wish it had been written in such a manner, as to have render'd him, whoever he is, less sore, less angry: He might have saved in his Common-place-Book much Learning and Knowledge for some happier Occasion, and I might have saved to myself and my Reader the Trouble of even this short Stricture upon his Work.

Had this Author afforded me any Clue, or regular Connection, by which I could have followed

followed him in Argument, I would have endeavoured, from a Love of Truth, to have taken into Consideration at least the principal parts of his Production. Happily for me, and probably for my Cause, which must doubtless have suffered in so unequal a Combat, my Antagonist has entirely prevented me from closing in with him, by keeping himself at such a Distance from me; sometimes dodging, sometimes attacking, sometimes flying into other quarters. In short, to quit the metaphor, he has so nobly set at defiance all Order and Method throughout his Work; he has so ingeniously interwisted his Matter and Argument; that the Whole remains an agreeable Confusion, which I confess I have neither Leisure nor Capacity to unravel. There is, however, one capital Mistake, in which I think fit to set him right, and in which at least I hope he will allow me to have some Pretence to speak with Certainty; namely, as to the Person of the Author of the Pamphlet. Tho' I do not think it necessary to declare who is the Author, I will so far declare who is not the Author. I do assure the Gentleman, for once, his Guess is wrong, nay wide, very wide of the Mark, in the Persons he alludes

to. It remains for me, however, to thank him for the Compliment, which I do most sincerely; and to lament that such a Profusion of Wit, keen Satire, and elegant Declamation, has been thrown away to no Purpose, by the Misapplication of it.

I doubt not he must have been deceived by some very strong presumptive Circumstances, before he could be induced to make his Attack so personal; for that the *Father of Candor* should have chose to have assigned a Name to a Writing he disapproved, merely that he might have an Opportunity of uttering a great deal of Malice and Falshood against some Individual he hated, would be a Supposition too injurious to the Character he has assumed. Whatever was the Cause of his Deception, I hope he will be more cautious for the future; and that in the mean time he will rest assured that no *Attorney*, or *Attorney's Superior*, has any Share in the Merits or Demerits of the Defence of the Majority. I shall by no means examine into the profound Knowledge he displays in his History of the Birth, Parentage, and Education of the Constitution; and with most sincerely that he and his
 Party

Party may never give Occasion to add to it the last dying Speech and Confession.

It is a favourite Representation of this candid Gentleman, as well as of others of his candid Party, upon the Subject of Libels, to alarm the Fears of every Individual; by insinuating that the Press is in Danger of losing its Liberty; that we shall soon scarce be able to call an honest Minister a Rogue *impunedly*: in short, that the Administration, through the whole Course of the Prosecution of the *North Briton*, have had nothing else in View but to revenge themselves of personal Contempt or Ridicule thrown upon them by that Writer; that the Libel was ----- a Libel; that in some Instances they think a Libel a very good sort of thing; that therefore they think it very hard that a Libel, which is all but High Treason, should be more seriously treated than a ridiculous Sonnet, a Print, or a Caricatura: But, above all things, they hold the Constitution of this Country is totally overturned, the Moment that a Crime, which threatens the Lives of many, and the Peace and good Order of the whole State, is to be considered of equal Importance

tance with a drunken Quarrel, or a Porter's broken Head.

Let these Gentlemen, once for all, set their Minds at rest: their own Productions sufficiently evince the Liberty of the Press still existing in full Force. For any thing Experience shews to the contrary, they may go on inventing and uttering Calumnies upon every respectable Character in this Country, Ministers of all Kinds and Descriptions, Judges upon the Bench, and insulting whatever other Objects they think fit---save and except only the King upon the Throne, the two Houses of Parliament, and the Laws of the Land, the last of which they may venture very far in misrepresenting with Impunity.

The Passages that are quoted up and down in this Work from the *Defence of the Majority*, are in general so disjointed, misapplied, misunderstood, and misrepresented, that I confess I cannot acknowledge them, much less defend them, as they stand in the *Enquiry*. I can therefore answer the *Father of Candor* no other way, than by entreating him, as he seems to have a great deal of Leisure, that he would do me the Honour to read the whole Context once over again; after

after which, I trust to his own Feelings that they will do me better Justice.

That my Readers however may not be misled by the laboured Erudition of this Gentleman, and that they may have some Idea of the whole of his candid Performance by a Part of it, I will take the Liberty of observing upon two of the Points he principally insists upon. He informs us — That the Informations *ex officio*, by an Attorney-General, may be considered as illegal and oppressive; — and that a Libel, which is laid to be false, ought to be proved so. In order to establish his first Point, he lays down this Doctrine, that the Attorney-General's Information was an Offspring of the Star-Chamber, and is contrary to the Genius of the Law of *England*. — He roundly asserts, that by the old Constitution, and afterwards by *Magna Charta*, no Man could be put on his Trial for any Offence until a Grand Jury had found a Bill of Indictment, or upon their own Knowledge made a Presentment thereof; and he quotes a supposed Dictum of Lord Hale's, “ That if ever this Information was disputed, it could not stand, but “ must necessarily fall to the Ground.” This Dictum, with the Substance of what else he

has advanced on this Point, is borrowed from Sir *Francis Winnington*, who, in a Case reported 5 *Mod.* 459. where he was Counsel for about 70 Rioters, in an Argument more ingenious than solid, insisted that no Information lay against his Clients, & quoted *Magna Charta*, and the old Law Books, on this Occasion :—But as the *Enquirer* has not thought proper to state the whole of this Case, I shall take the Liberty of doing it for him. — Sir *Francis Winnington's* Argument was answered by Sir *William Williams*, *pro Rege* :—And one of the Puisne Judges, and Lord Chief Justice *Holt*, observed, that Lord Chief Justice *Hale* (whom they all personally knew) had been heard to complain of the Abuse of Informations, but never disputed the Legality of them; and the whole Court declared themselves clearly of Opinion, that these Informations lay at Common Law; and Lord Chief Justice *Holt*, in delivering his Opinion, has these remarkable Words : —“ We shall hardly come now, and impeach “ the Judgement of all our Predecessors.” The Defendant's Counsel (whose Business it was to delay the final Hearing of the Cause) prayed the Court for a second Argument in the next *Michaelmas* Term, when they did
not

not think proper to insist upon this Point; and the Court gave Judgment against the Defendants. Sir *Bartholomew Shower*, however, who had prepared himself to argue this Point *pro Rege*, has published his intended Argument, which is a very learned and elaborate one. In this Argument (which may be found in his Reports, p. 106.) he has proved, beyond Contradiction, that this Information lay at Common Law, and that it had been in Practice from the earliest Times, as appeared from a great Number of Precedents which he had collected, by a long and laborious Search in the Crown-Office, and the old Law Books.—He observed, that the Words of *Magna Charta*, cited for the Defendants (viz. *Nullus Liber Homo capiatur vel imprisonetur, &c. nisi per legale Judicium Parium suorum, vel per Legem Terræ*,) did by no Means contradict, but rather established, this Method of Prosecution, which was founded on the *Lex Terræ*, or Common Law of the Land; and Sir *Bartholomew* mentions his having seen a Manuscript of Lord Chief Justice *Hale's*, in *Lincoln's-Inn* Library, in which was an Account of several Informations filed between the first and eighteenth Years of the Reign of

King *Edward* the First. — The Conclusion of his Argument is as follows: “ Upon the
 “ whole Matter, after so long a Usage, so
 “ much Approbation from the Judges and
 “ Parliaments, so many publick Directions
 “ in Court for them, and no Complaint of
 “ their Illegality till now, and so plain a
 “ Consistency as they have with every funda-
 “ mental and other Rule of Law, for to
 “ destroy this without Act of Parliament,
 “ will be as much against *Magna Charta*, as
 “ the contrary is agreeable with it, which is
 “ as plain as the Words of it.”

As to the second Point, it is not a Doctrine of the present Day, but has been uniformly held in all Times, that it is not necessary to prove the Falseness of a Libel. In a settled State of Government, Parties grieved ought not to make themselves their own Judges, nor to take their Revenge by the odious Course of Libelling, or any other private Method, but should refer the Decision of their Grievances to those whom the Law has appointed to determine them.

Whether a Jury on the Trial of a Libel, have a Right to determine the Law and Fact, I shall leave to the Enquirer to discuss; it is a Question of too much Delicacy and Im-

Importance for me to decide. Much greater Authorities than either of us have differed in their Sentiments upon this Matter, and to them I must beg Leave to refer the Reader.

Upon the Whole then of the *Enquirer's* Doctrine, tho' I am ready to throw back in his Teeth his *Political Eaves-dropper*, and *Divine Hereditary Right Man*, I will venture to assert, that his Principles of Government, in the Extent he uses them, are not to be supported upon any sound Basis of Law or Constitution. *Nolumus Leges Angliæ mutari*. The System of the *British* Constitution, preserved upon its true Principles, is as a firm and well-cemented Arch, bearing equally in all its Parts to the great Center of public Security and Advantage. But if an ignorant or rash Hand once begins to fashion it according to his Fancy, to remove the *Keystone*, or to diminish its Proportions, not only the Beauty but the Strength of the Fabrick is at once dissolved, and the whole Mass must fall together.

The *Reply to the Defence of the Majority*, as it is written with more Decency, and
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Appearance of Fairness, than the Pamphlet last mentioned, so it deserves a more particular Answer; which I hope I shall be able to give, to the Satisfaction of my Reader, without engaging in any very long Detail.

To begin then with the Affair of Privilege.---There are two Points only, by which Privilege of Parliament can be interested in the Business of Mr. *Wilkes*. The one has been already decided by Parliament, and in my Opinion, I am free to say, upon the most convincing Arguments that ever determined them upon a Question of Importance. They have declared that there is no Privilege in case of a seditious Libel. In that Instance therefore Mr. *Wilkes*, a Member of Parliament, stands upon the same Ground with every other Subject; and in his Person, supposing the Proceedings to have been *legal*, no Privilege has been violated. Yes, but (says my Antagonist) the Warrants were *illegal*; and “wherever the Law has been violated in the Person of a Member of Parliament, Privilege is violated also; or, in other Words, whatever Act is illegal towards another Subject, is also Breach of Privilege towards a Member of Parliament: This constitutes his second
Point

Point of Privilege." In Answer to this, I must first observe, with regard to the Legality of the Warrants, that it stands now confess'd, by the *Reply*, that that Question has been in Issue, *has been debated*, and *the Illegality declared*. If this be so, I would wish this Gentleman to communicate his Discovery to the Defender of the Minority, for his Information, as they seem to clash in their Sentiments upon this Subject; and as it would be a Circumstance, in the Opinion of many, of no inconsiderable Importance in justifying the Determination of Parliament.

I must, in the next place, beg Leave to deny the general Maxim of the *Reply* concerning Privilege of Parliament. It would be easy, I conceive, to state a Variety of Instances, in which the Law may have been violated in the Person of a Member of Parliament, and an Action may lie, and Damages be recovered by due Course of Law, and yet the Privilege of Parliament may not be affected by it. If I may be allowed to deliver my Opinion upon so delicate a Subject, I shall not scruple to say, that there can be properly no Claim of Privilege, but in Cases that imply some Degree of Constraint

Astraint or Hindrance to the Member in the
 free Exercise of his Duty in Parliament, or
 in Cases that tend to diminish the Reverence,
 and to withdraw the Confidence, due from
 the People to the two great Bodies of
 Legislature. In this Light it must be evi-
 dent to all Men, that such Rights are as
 essential to the Constitution of the Repre-
 sentatives of the People, as it would be in-
 compatible with the Safety of the Electors,
 and their own Dignity, if they could plead
 a Privilege with Impunity of degrading their
 own Body, or of inciting the People to In-
 surrection. This I hold to be parliamentary
 Language, and to be rather a more clear as
 well as a more just Distinction, than any De-
 finition of *Privilege of Parliament*, and *Prero-
 gative of Parliament*; “ of Privileges for the
 Security of the Representatives of the Peo-
 ple, and *Powers usurped, which have rendered
 the Name of Privilege odious, and its Existence
 intolerable.*” -- Words that I should not have
 expected to have seen used by an Assertor of
 the Liberties of the People, and the sacred
 Immunities of Parliament. But there is an-
 other Circumstance which I conceive to be
 absolutely necessary to constitute a Breach of
 Privilege, *viz.* an *intentional Contempt*. It is
 well

well known, that in the most avowed and acknowledged Instances of Breach of Privilege, where Innocence of Intention is once proved, Parliament proceeds no further. If this Doctrine is well founded then, if it concurs both with the Usage and Principles of Parliament, What becomes of this second Point of Privilege, supposing the Warrants to be illegal? The same unlucky Amendment, or *Addition*, call it what they will, which they dared not reject, because it was too strongly founded upon Truth; yet had not the Generosity spontaneously to insert into their Motion, for fear, it seems, of becoming themselves *the Defenders of the Majority*; that long Paragraph, which they would be so glad to shorten, here again holds out the Shield of Innocence to the Accused, and defeats the Purposes of the Accusers. Can the Ministers be supposed to have *intended* an Insult to the Privileges of the Commons, by the *Illegality* of an Act, which, with so much Reason, they imagined *legal*, and which had been so often practised by the *very Persons, and their Ancestors*, who are now willing to build upon the *Illegality* of it an *intentional Breach of Privilege*!

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I will readily agree with the Writer, that *Treason* is one thing, and a *Libel* is another. Had the *North Briton* been adjudged *High Treason*, when it was adjudged *treasonable*, the Author probably would have felt a very sensible Difference. Under Favour of the *Reply*, the Nature of *Libels* may differ as much as the Complexion of the Writers. There are profane *Libels*, false, scandalous, and malicious *Libels*, blasphemous *Libels*, and seditious and treasonable *Libels*. The Case of the *North Briton* was adjudged *seditious*, *treasonable*, and a *Libel*, and accordingly deserved and obtained a Consideration very different from what it would have had, if it had been adjudged a *Libel* neither treasonable or seditious. These Epithets were therefore necessarily inserted to *describe*, not to *alter*, the Nature of a Crime, which was so far from being upon the Footing with all other *Libels*, that it was within a Hair Line of being adjudged the highest Crime our Law acknowledges. If an Incitement to resist the Law by Force, after vilifying every Branch of the Legislature, industriously thrown out of Sacks into the West Country Waggons, to be distributed into those Counties, where it was most likely to take Effect upon the Interests and

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Passions of the People, had been adjudged an Endeavour *to excite*, instead of *tending* only to excite, I repeat it again, it would have been considered as High Treason, without any Palliation whatsoever.

As for the Alarm, that every political Paper may be stiled a Libel, every Libel treasonable, and every treasonable Libel High Treason; it deserves no Answer, any more than the Application of the Cases of *Algeron Sidney* and *Mr. Montague*, which have so little Resemblance to the Case of *Mr. Wilkes*: This is declaiming, not arguing, and therefore deserves no Argument in return.

I am accused of Ignorance, if I do not acknowledge that in Cases of Treason and Felony, Papers cannot be used in Evidence against the Person in whose Custody they are found. In consequence of this Assertion, the *Reply* demands triumphantly, "What the Law has forbidden in Cases of Felony and Treason, does the Minister claim a Power of doing in the Case of every political Paper, &c.?" I confess I am so ignorant as not to know this Maxim of the Law, which Practice and Experience seem to contradict most strongly. In the Case of

Algernon Sidney, where Similitude of Hands was held to be good Evidence of his having written the Paper charged against him as an Overt-act of Treason; Parliament, in the Reversal of his Attainder, did declare, that Comparison of Hands was no Evidence of Hand-writing *in a criminal Case*: But that it has been always admitted as *circumstantial and corroborative* Evidence, especially when authenticated by other Circumstances as well as Similitude of Hands, where the Fact also has other Proof, I believe, upon Recollection, this Gentleman will hardly deny. If, however, he has any Doubts about it, I would recommend to him to cast his Eye upon an Extract in the Note that may satisfy *him*, so far as the Opinion of Lord Chief Justice *Holt* will go,* though, as to my Friend the

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* *King and Crosby. Easter Term, 7 W. & M. 1695.*
Cases in B. R. Temp. W. 3.

In the course of *Crosby's* Trial for High Treason "several treasonable Papers were produced, which the Witnesses swore they *believed* to be the Hand-writing of the Prisoner: And on this a Question arose, whether a Comparison of Hands was not sufficient; *et per cur*: It is not sufficient for the *original Foundation* of an Attainder, but may be well used as a *circumstantial and confirming* Evidence, if the Fact be otherwise fully proved; as in Lord *Preston's* Case, his attempting to go with them into *France*, and principally where they were found upon his Person: But

here,

Enquirer, I doubt not he will make all easy to himself, by calling him, in his usual elegant Language, “ an old Tory, one of your staunch Men, who go thro’ thick and thin, ready to vouch for the Cure of the King’s-Evil by the Touch of the true Royal Line : ” Such is the Ribaldry which Party does not disdain to use.

But tho’ I am not very much hurt with this Imputation upon my Ignorance, there is another Accusation in the 31st Page, which touches me more nearly ; *viz.* “ That I have made myself the Object of my own Scorn, by attempting to revile a Character which Profligacy itself might be shocked to scandalize.” As I take it for granted the Author meant little more by this Sentence than to seize an Opportunity of making a Compliment to a Friend at my Expence, I think it very pardonable ; and as for the Character, it shall remain just as sacred as he pleases, for any thing I have to say against

here, where they were found *elsewhere*, to convict upon a *Similitude of Hands* were to run into the Error of Colonel *Sidney’s Case*.”

The same Case is reported in *Skinner’s Reports* 578, where it appears that *Eyres*, Justice, and *Holt*, Chief Justice, sat as Judges on this Trial. It is likewise reported in *Lord Raymond’s Reports*,

it.

it. In the mean time, if he will take the Pains to turn back to the Passage he is offended with, he will find, and I dare say will acknowledge, his Mistake; he will see that the provoking Attributes he complains of, are by no means applicable to any Man who is *not*, but to the Man *who actually is*, the Author of that excellent, unanswered, and incomparable Piece, the *Budget*: He will see, that it was to the Defender of the Minority, and not to the Defender of the Majority, that his Friend is indebted for the Reputation of that Performance, which I am most sincerely glad to hear disclaimed for him, because I think most sincerely that the Work is not worthy the Abilities of such an Author; nor do the Qualities, I hope, of that Person fit him for such a Work.

Let me now retaliate upon the *Reply* himself, and ask him as a Man of Honour and a Gentleman, whether he thinks it becoming in him to insult the Memory of a Man who is not living to answer him, upon a mere *Report*, a Hearsay, which he does not pretend to assert the Truth of: Let me ask him, if he does not in his Conscience believe, that the contrary Sentiments in which that Person died, and his affectionate Attachment,

ment, are the real Reasons why he has been pointed out so maliciously by the Virulence of Party?

It would take up too much Time to examine separately each of the Parliamentary Cases, cited in the *Reply* to prove the Usage of Resolutions of the House with regard to Points of Law. He who cites them seems doubtful whether they are apposite, and I believe with some Reason. That Parliament has frequently resolved upon the Illegality of Acts committed in order to found Impeachment upon their Resolution; that they have stated Grievances in order to apply a Remedy to them by Bill, which with the Consent of the other two Branches of Legislature obtains the force of Law; I have never yet heard denied: but an Instance where the House of Commons have thought fit to take upon themselves the expounding of a Point of Law at that time pending in the Courts below, by a mere Resolution or Declaration, which might intimidate a Judge or prejudice a Jury in a Cause actually before them; —such an Instance I have yet no-where met with, and, till it is made most clearly evident to me, I shall not believe to exist.

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The Minority did not intend to found Impeachment upon their Resolution, for they acknowledged there was no Blame : they did not mean, as they assure us, to found a Bill upon their Resolution, though the Offer was made them, if they thought proper, in the very Words of their own Motion : They even opposed and slighted the Motion of Sir *J. Philips* for a Bill ; and the World is by no means ignorant of the Motives upon which they acted. In return they demand of Administration, if the Majority really intended to pass the Bill, how came it that the Minority could reject what the Majority intended ? A Question plausible enough, and which has about as much Solidity in it, as the rest of their Reasoning upon the Subject. As far as it has come to my Knowledge, I never heard that the Majority conceived a Necessity of passing either the Resolution or the Bill. As they had no Apprehensions, they desired no Remedy. The Gentlemen of the Minority, who were the Persons alarmed, proposed the Resolution as a Remedy ; the Majority rejected it, as, for many Reasons, insufficient and improper. But at the same time the Majority, desirous to pacify those Fears which others had expressed,

ed, offered a real Remedy by Bill: Is it then a Matter of wonder that if that Remedy was declined by the Minority, the Majority did not persevere in pressing it upon them?

I shall not dwell upon the disingenuous Reflections at the latter End of the Performance I have now before me. I wish every Man who engages in public Life may persevere with that Integrity of Heart, that Consistency of Conduct, which leaves nothing to his Enemies to reproach him with, but the Blame reflected back from others. The same Wisdom, Temperance, and Moderation which taught *that Person* in time to foresee Dangers, yet restrained him from increasing, by rash and violent Determinations, those Distresses which he had not sufficient Influence to prevent, will enable him at all Times to discern, and with Firmness and Constancy to pursue, the sole Object of his Care, the Happiness and Prosperity of his Country.

To close then the whole Argument in the manner of the Reply, I shall state back again to him his own reasoning. *An Act of Power was committed, which the People in the many previous Instances had never thought a*

Violation of their Liberties. In this Case, however, *their Passions* became *incited*. To *allay these Emotions*, an *in-effectual Remedy* was *proposed by the Minority*; and rejected by the Majority. One that might have been made effectual was afterwards proposed on the Side of the Majority, but declined, flighted, and contemned by the Minority.

Ministers, therefore, have a Right to the Confidence of the People, in Preference to a Party, who persist in Misrepresentation: and whatever Hopes these Gentlemen may flatter themselves with, the calm, the thinking, the valuable Part of the Nation, will never withdraw their good Opinion till they are *really Hurt, and are denied Relief*.

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F I N I S.

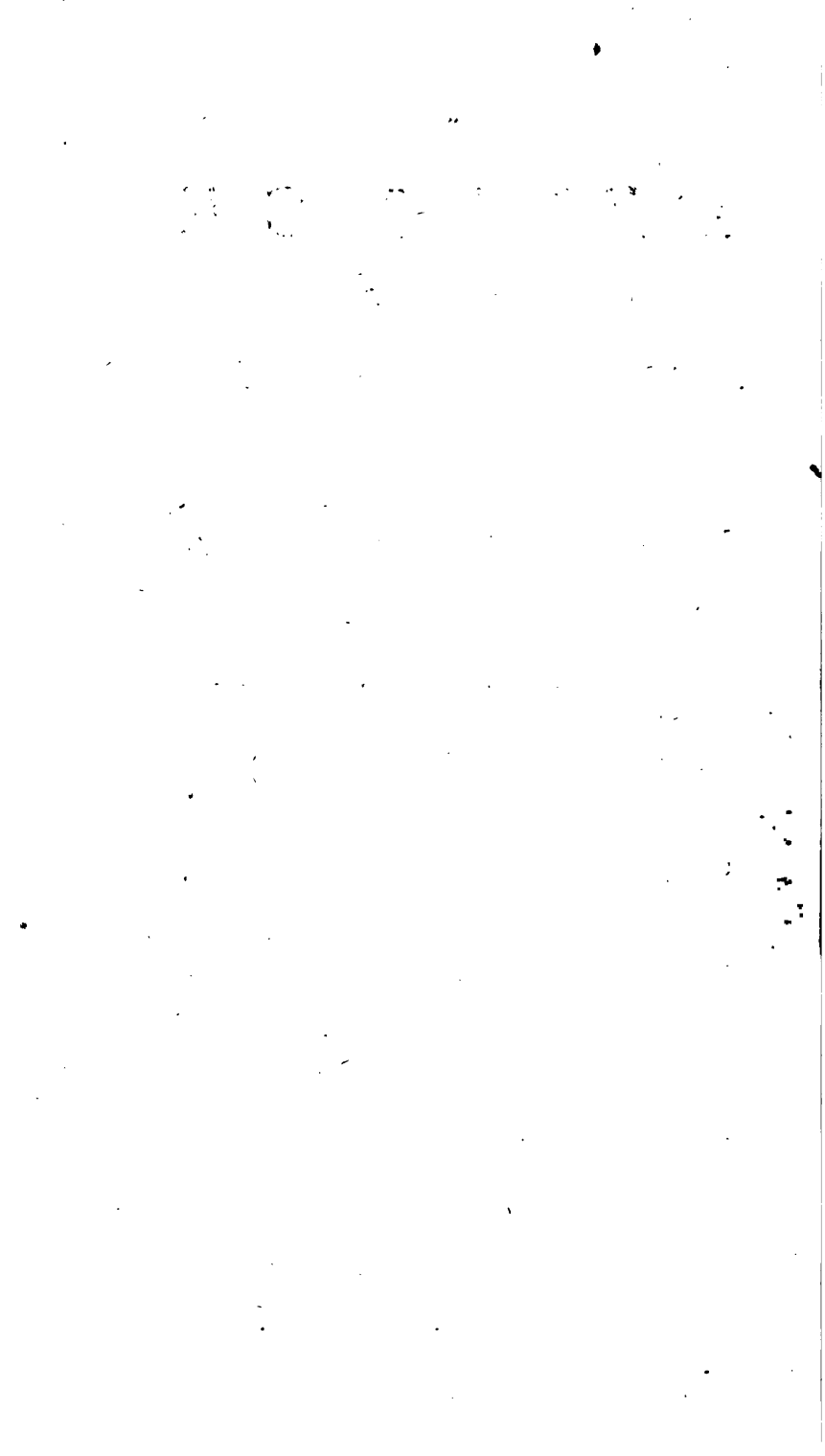


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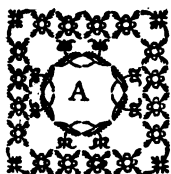
DEFENCE

OF THE

MINORITY

IN THE

HOUSE OF COMMONS, &c.



AFTER the many Arts employed, and the occasional Writings lately published, and diligently circulated, to establish an Opinion favourable to the Views of the Ministry, upon the Motion made and rejected in the last Session of Parliament, for declaring the Illegality of certain general Warrants, issued by Lord *Halifax*; it will probably

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not

not be thought extraordinary, that there should be found *one* Man in this Kingdom, who, from his Attachment to the Reputation and Merit of the 220 Members of the Minority of that Day, so grossly injured in these Writings, is unwilling to acquiesce in Silence under so general and wilful a Misrepresentation, both of the Subject itself and of Their Conduct.

One of these Writers, who seems to bear some Marks of Authority, begins His Work * with this Observation : “ That it is not singular, that some of the Constituents of the Members of the Minority should not be perfectly acquainted with the Motives to the Question, which was this Year brought into the House, considering their Distance from the Scene of Action, and the Diligence used in the Misrepresentation of Facts.” He next accuses some particular Members of Ignorance or Insincerity, for having declared in their Answers to the Address of Thanks from their Constituents ; “ That They were defending the undoubted and undisputed Birth-right of the Subject,” and then states the Mo-

* A Letter first published in the *Gazetteer* of May 23, and lately reprinted with the *Wallet*.

tion lately made in the House of Commons to have been this, “ Whether a general Warrant from a Secretary of State be warrantable by Law or not.”

Now if it should happen to be true, (and I undertake to shew it) that *no such Motion* was made in the House of Commons, and that this *favourite Proclamation* of the Ministry is, in every Fact, Inference and Argument, false as applied to Things, and unjust as applied to Persons; it will then indeed not be thought extraordinary, that *Constituents at a Distance should be sometimes misled by Diligence in the Misrepresentation of Facts*. It will be clearly discerned, upon what Grounds these Writers have proceeded to charge others with Ignorance and wilful Fallacy, for differing from Them upon a great national Question, the Terms of which They have not yet learnt, and the Meaning of which They have not comprehended; and consequently how far They are Themselves in the Predicament, either of Those, whom They condemn for Ignorance, or of Those, whom They accuse of Falshood.

It is become incumbent upon me to demonstrate the Truth of this Assertion, unless I would be ranked in the same Class of confident Writers : Nevertheless I enter upon the Proof with no other Apprehension, than what the Difficulty of the Subject naturally creates ; where so many Proceedings in Parliament and Judicature are to be stated, and where every Step, the Motives of every Measure, and the Consequences, are to be explained with some Precision, both in Argument and Language,

In the first Place then I am to shew, that the Motion, stated in the Letter to the Leaders of the Minority, never was made in the House of Commons : to prove which, I need only transcribe from the Votes the Motion made on the 14th of *February*, which was, “ That a general Warrant for apprehending and seizing the Authors, Printers and Publishers of a seditious Libel, together with their Papers, is not warranted by Law.”

It is obvious to every Body, how far this Question differs from that stated by the Author, not in form but in substance.

His

His Question is general ; it extends to all Cases of Emergency, in the instant of any supposed public Danger or Confusion ; and the Determination of it in the negative would preclude the use of general Warrants issued by Secretaries of State, in every *extreme* Case, which Imagination can put, or which Necessity would justify, Whereas the Question, actually moved in the House, confines itself to general Warrants issued *in the Case of a seditious Libel* ; it is precise ; it decides not upon the Exercise of the same Power in Cases not included ; it was formed thus to avoid the very Objections now made to the Question as stated by the Author, and perhaps has since been misrepresented in the Political Writings of these Times, merely for the Opportunity of making such Objections. There is so essential a Difference between these two Questions, that it is evident, a thinking and an honest Man might very fairly and consistently have voted *for* the one, and *against* the other. For example, in the Case of High Treason, I may think it justifiable in Consideration of the *public Danger*, the *nature of the Offence*, the *Necessity of Secrecy and Dispatch in preventing such Conspiracies against the public Weal*, to connive at the use

use of general Warrants of Apprehension ; but in the Case of a Libel already published, where the Mischief is done, where the Degree of public Danger is comparatively so small, and the Offence itself, to the reproach of our Laws, so very vague and undefined, I may, and do, think, that such an *unlimited* Power, over the Persons and Goods of all Subjects, is neither necessary nor expedient to be lodged in any Hands. The Minority saw this Distinction. They adopted it. They conformed their Question to it. So far were They from making the Proposition, which these Writers impute to Them, that They framed Their Motion upon the Case before Them ; confined it to a seditious Libel ; and had both too much Sense and too sincere a Regard for public Tranquillity to stir *captiously* so delicate a Question of Government, as that which They are now, with so little Candor, charged with having actually agitated.

Having thus absolutely misunderstood and mis-stated the Question, the same Author proceeds, as he says, “ To evince the Truth of this Assertion, to place the Subject in a right Point of View, and to prove, that the Minority did not act from any such
liberal

liberal Motive, as the Desire of securing the Person of the Subject, or his Papers, against illegal Seizures in such Cases."

To demonstrate this, he sets out with assuming, that the Lord Chief Justice of the Common Pleas had, in the Cause of *Wilkes* against *Wood*, determined the Seizure of Papers, under such Warrant, in such Cases, to have been illegal. He then assumes, in the second Place, That Bills of Exceptions presented in Appeal from the Decision of the Chief Justice of the Common Pleas, upon the Legality of the Warrant, have *ever since* been actually depending before the whole Bench of Judges ; and at last, being now in Possession of the advantage Ground, to carry which He before assumed all these preliminary Points, He roundly asserts that, *in this Situation*, and Matters thus depending, it was the Duty of the Minority to have waited the Issue of that Appeal. We have seen some Instances of the Writer's Exactness in stating the Motion in Parliament ; let us now enquire, if he is more accurate in his Detail of the Proceedings in the Court of Common Pleas.

In

In the first Place then I maintain, in Contradiction to these Assertions, that the Question of the Legality of the Warrant is not *now* sub judice, nor *has ever yet been in a Course of legal Determination*; to prove which I will state fairly and precisely the Rise and Nature of the several Bills of Exceptions, either *actually tendered* or prepared; and then leave the Reader to determine by his own Judgment.

In the Action brought against the Messengers, by the Servants of the Printers a Bill of Exceptions was, I admit, tendered; but it should be also remembered, that the only Question depending upon that Bill is, *whether the Secretary of State be a Justice of the Peace* within the Equity of the Act of the 24th of George the Second; which is a Point very material in the Defence of the Messengers acting under Orders, but has no Connection with the Question upon the Legality of the Warrant itself.*

In

* The Bill of Exceptions tendered in this Cause, after reciting the Pleadings, and stating the Evidence produced on the Part of the Defendants, goes on thus :

In the Action brought by *Wilkes* against *Wood*, after Mr. *Wood* had pleaded as the
Messengers

thus : " Whereupon the said Council for the aforesaid Defendants, did then and there insist before the Chief Justice aforesaid, on the behalf of the Defendants abovenamed, that the said several Matters so produced and given in Evidence on the Part of the said Defendants as aforesaid, were sufficient and ought to be admitted and allowed as decisive Evidence, to entitle the said Defendants to the benefit of the Statute made in the Twenty-fourth Year of the Reign of his late Majesty King *George* the Second, intituled, " An Act for rendering Justices of the Peace more safe in the Execution of their Office, and for indemnifying Constables and others acting in Obedience to their Warrants; and, that therefore, the said *William Huckell* ought to be barred of his aforesaid Action, and the said Defendants acquitted thereof, and thereupon, the said Defendants by their Council aforesaid, did then and there pray of the said Chief Justice to admit and allow, the said Matters and proof so produced and given in Evidence for the said Defendants as aforesaid, to be conclusive Evidence to entitle the said Defendants to the benefit of the Statute aforesaid, and to bar the said *William* of his Action aforesaid. But to this, the Council learned in the Law, on behalf of the said *William Huckell*, did then and there insist before the Chief Justice aforesaid, that the Matters and Evidence aforesaid, so produced and moved on the Part of the said Defendants as aforesaid, were not sufficient nor ought to be admitted

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or

Messengers had done in the former Case, and rested his whole Defence on the general

or allowed to intitle the said Defendants to the benefit of the Statute aforesaid, or to bar the said *William Huckell* of his aforesaid Action; and that neither the said Defendants, or any of them, nor the said Earl of *Halifax* were or was within the Words or Meaning of the Statute made in the Seventh Year of the Reign of his late Majesty King *James* the First, intituled, An Act for ease in Pleading against Troublesome and Contentious Suits prosecuted against Justices of the Peace, Mayors, Constables, and certain other his Majesty's Officers, for the lawful Execution of their Office; nor of the Statute made in the Twenty-first Year of the Reign of the same late King, intituled, An Act to enlarge and make perpetual the Act made for Ease in Pleading, against Troublesome and Contentious Suits prosecuted against Justices of the Peace, Mayors, Constables, and certain other his Majesty's Officers, for the lawful Execution of their Office, made in the Seventh Year of his Majesty's most happy Reign; nor of the said Statute made in the Twenty-fourth Year of the Reign of his late Majesty King *George* the Second; nor in any ways intituled to the Benefit of any of those Statutes. And the Council for the said *William Huckell* further insisted, that the Seizure and Imprisonment of the said *William Huckell*, were not made or done in Obedience to the said Warrant, nor had the said Defendants, or any of them in that behalf, any Authority thereby: and the said Chief Justice, did there and there declare and deliver his Opinion to the

heral Issue; and the Cause stood ready for Trial; the Court of Common Pleas was moved on the part of the Defendant, that He might be permitted to justify under the Warrant, *in order to bring the Matter fully and fairly before the Court*; which the Court after Consideration; for *that Reason*, and *that only*, allowed. But when the Cause came to be tried, Mr. *Wood*, by the Advice of his Counsel, or Attorney, and to the Surprise of the Chief Justice, deserted his Justification; declined the Opportunity which the Court had indulged him with, of bringing the Validity of the Warrant into Debate; and resorted to the old Objection, namely, that the Secretary of State was a Justice of the Peace, and therefore ought to have been made a Party Defendant in the Suit. In consequence of which, the

Jury aforesaid, that the said several Matters so produced and proved on the Part of the said Defendants, were not upon the whole Case, sufficient to bar the said *William Huckell* of his aforesaid Action against them, and with that Opinion left the same to the said Jury; and the Jury aforesaid, then and there gave their Verdict for the said *William Huckell*, and Three Hundred Pounds Damages: Whereupon the said Council for the said Defendants, did then and there on the behalf of the said Defendants, except to the aforesaid Opinion of the said Chief Justice."

the Bill of Exceptions offered in this, as in the former Action, turned only upon the *same single Point*, and the Question of the Legality of the Warrant was a *second Time avoided*.*

In

* The Bill of Exceptions in this Cause, recites the special Justification, and in that Respect differs from the former; but the Conclusion, which is the material Part of the Bill is substantially the same: "Whereupon the said Council for the said *Robert Wood*, having proved the several Matters aforesaid, did then on behalf of the said *Robert*, alledge and insist before the Chief Justice abovenamed, that the said several Matters so produced and given in Evidence on the part of the said *Robert Wood*, were sufficient and ought to be admitted and allowed as decisive Evidence, to entitle the said *Robert Wood* to the benefit of the Statute, made in the Seventh Year of the Reign of King *James* the First, intituled, An Act for ease in Pleading against troublesome and contentious Suits prosecuted against Justices of the Peace, Mayors, Constables, and certain other his Majesty's Officers, for the lawful Execution of their Offices: And also, to the benefit of the Statute made in the Twenty-first Year of the Reign of the same King *James* the First, intituled, An Act to enlarge and make perpetual the Act, made for Ease in Pleading against troublesome Suits, prosecuted against Justices of the Peace, Mayors, Constables, and certain other his Majesty's Officers, for the lawful Execution of their Office, made in the Seventh

In the Cause, in which *Leach* the Printer was Plaintiff, the Messengers pleaded *the general Issue*, and, at the same time, a *special Justification*, stating the Warrant of Lord Halifax, and the Acts which they had done to have been in Obedience to, and in the Execution of that Warrant. At the Trial, they entered at large into the Proof of the Facts alleged in *their special Justification*, which led the Chief Justice, in stating the Evidence to the Jury, to declare it as his clear Opinion, that if the Facts of the Justification *had been proved*, the Warrant, under

Seventh Year of his Majesty's most happy Reign: And likewise, to the benefit of the Statute made in the Twenty-fourth Year of the Reign of our late Sovereign Lord King *George* the Second, intituled, An Act for tendering Justices of the Peace more safe in the Execution of their Office, and for indemnifying Constables and others acting in Obedience to their Warrants; and therefore, that the said *John Wilkes*, ought to be barred and precluded from his aforesaid Action; and the said *Robert Wood* acquitted thereof. And thereupon, the said *Robert Wood*, by his Council aforesaid, then prayed of the said Chief Justice, to admit and allow the said several Matters and Proofs so produced and given in Evidence for the said *Robert Wood* as aforesaid, to be sufficient and competent Evidence, to entitle the said *Robert*, to the benefit of the said several Statutes, and to bar and preclude the said *John Wilkes* from his Action aforesaid."

under which the Messengers had acted and justified, was illegal. But as the Jury, by Their Verdict, were of Opinion, that the Defendants *had failed in their Proof*, no Bill of Exceptions could lie upon the Question of the Validity of the Warrant, as no Facts were found by the Jury, upon which the Law could arise, or the Exceptions be supported. *

After

* The Bill of Exceptions in *Leach's Case*, recites the special Justification of the Messengers, and the Evidence produced by them in support of it. But the Point put in Issue by the Conclusion of it, is the same without the least Difference, as in the former Bills of Exceptions: "Whereupon the said Council for the said Defendants, did then and there insist before the Chief Justice aforesaid, on the behalf of the Defendants abovenamed, that the said several Matters so produced and given in Evidence, on the Part of the said Defendants as aforesaid, were sufficient, and ought to be admitted and allowed as decisive Evidence, to entitle the said Defendants to the benefit of the Statute, made in the Twenty-fourth Year of the Reign of his late Majesty King *George* the Second, intituled, An Act for rendering Justices of the Peace, more safe in the Execution of their Office, and for indemnifying Constables and others acting in Obedience to their Warrants; and that therefore, the said *Dryden Leach*, ought to be barred of his aforesaid Action, and the said Defendants acquitted thereof;

After this Representation of the Proceedings in these Three Trials, which, we persuade ourselves, will be found to be candid and exact, upon comparing it with the Bills of Exceptions inserted in the Notes, it will probably be admitted, that the only Question now in legal Issue, or that can be brought before the Court, upon these several Bills of Exceptions, is whether a Secretary of State be a Justice of Peace.

But it may be asked, Will not this great Question be brought to Issue in the Cause now depending between Mr. *Wilkes* and Lord *Halifax* ?

That it may is *certain*, that it will, I think, is *doubtful*. Who knows how much longer a farther Use of the Advantages of Privilege on one Side and Distress on the other may continue to retard the Course of this

thereof; and thereupon the said Defendants by their Council aforesaid, did then and there pray of the said Chief Justice, to admit and allow the said Matters and Proof so produced and given in Evidence, for the said Defendants as aforesaid, to be conclusive Evidence, to entitle the said Defendants to the benefit of the Statute aforesaid, and to bar the said *Dryden Leach* of his Action aforesaid."

this Trial*. And is such a Contingency as this to be cited in Proof of a positive Assertion, that the Question itself was *actually in Issue*, when the Motion was depending in the House of Commons? Will any Man have the Assurance to argue, that the House of Commons could not, consistently with their Duty or Dignity, have refused to acquiesce under such an unconstitutional and illegal Exercise of an uncontrolled

* *Wilkes, Esq; against the Earl of Halifax and the three Messengers who executed the general Warrant* } Original was sued out, tested the first of *June* and returnable from the Day of the Holy Trinity in three Weeks (19th of *June*, 1763); and the Earl being summoned cast an *Essoign*, which was adjourned until the 18th of *November*.—Then comes in Privilege; which being at an End and all the *Essoigns* expired, a *Distringas* was taken out, tested the 9th of May, being the first Day of *Easter* Term, 1764, returnable from the Day of *Easter* in five Weeks (27th of May);—the Sheriff returns Forty Shillings *Issues*—The Earl does not appear—The Court directs Fifty Pounds *Issues*—An alias *Distringas* is taken out, tested the 30th of May, and returnable on the Morrow of the Holy Trinity (18th of *June*);—the Sheriff returns his *Issues*.—The Earl still refuses to appear—The Court orders Five Hundred Pounds *Issues*—A *Pluries Distringas* is taken out, tested the first Day of Trinity Term (the 22d of *June*) and returnable in three Weeks of the Holy Trinity (the 8th of *July*);—The Earl has not even yet appeared.

troled Power *in Office*, grounded on no sound Principles or Authorities of Law, made requisite by no Necessities of State, incompatible with personal Freedom, and frequently condemned by former Parliaments, upon the distant and precarious Suggestion, that it was possible, that *in some future Action*, to be postponed in some Degree *at the Will of the Party accused*, this great national Point might come to Issue? Yet thus do the Advocates of the present Ministry, and the Defenders of this Question humiliate the two Houses of Parliament; not only to encrease the Power of the Crown, (that might carry some Air of Principle and System with it) but to cover the Error of a Minister, infringing the Rights of the Subject in the most essential Article of Liberty, upon the Authority and Example of *secret and unadjudged* Precedents in the *modern* Practice of a *modern* Office; seeking Refuge in the Courts of Law from the Interposition and Resentment of Parliament, and yet to the utmost retarding the Issue of that very Appeal to Judicature, upon the full and public Assurances of which the Majority of the House of Commons were persuaded to leave this great Question in Reference.

D

Under

Under the former Head we have proved, that the Question moved in the House of Commons has been mis-stated : Under this we have shewn, that the Proceedings of the Court of Common Pleas have not been less misrepresented : That there is no Authority for the Assertion so confidently published, that Bills of Exception have been *actually tendered upon the Question of the Legality of the Warrant* ; and that the Court of Common Pleas, at this very instant, (many Months after it was resolved, that the House ought not to take Cognizance of the Question, upon the single Consideration and Assurance, that it would have a speedy Hearing and Determination at Law,) finds itself under the Necessity of reverting to the ancient Statute Law, in Preference to modern Practice, in order to give a *real* Force to its Issues for compelling Lord *Halifax* to such an Appearance, as will bring the Matter to Decision.

But, it seems, whatever was the apparent Conduct of the Minority, They could not be sincere ; because, after losing This Question, They refused a Bill moved by Sir *John Philipps*, to *regulate the Practice*
of

of *Secretaries of State* in issuing Warrants ; which Bill, it is alleged, the Leaders of the Minority opposed, and, upon the Evidence of that Opposition, they are now arraigned for Insincerity. Here too the same Writers are unfortunate, and again led into another false Triumph by their original Ignorance of the Question moved in the House of Commons. They would otherwise have recollected, that the Minority held the “ general Warrant for apprehending and seizing the Authors, Printers and Publishers of a seditious Libel, together with their Papers, to be Illegal,” and from thence have seen, how little They could vote for a Bill *to regulate*, what They did not admit to be legal.

Can it be seriously believed, that Sir *John Philipps* or the Ministry expected to be supported by them in bringing in a Bill to regulate, what They had asserted neither did nor ought to exist ? No : They could have no Right to suppose the Minority would not adhere to their declared Opinion ; and they must have recollected, that if They acted uniformly, They would necessarily confine Themselves to the *single Case* before Them. By what other Con-

duct could they have hoped to execute the Plan upon which They professed to act? To provide at once for private Liberty and public Safety ; by condemning the wanton Use of an *usurped* Power, in the Instance under Consideration, which, in their Judgment, had no Circumstances to justify it ; and by leaving uncensured, the Use *even of illegal Warrants in those extreme Cases*, which it is impossible to describe and distinguish before they happen ; but which the wisest Legislators of all Times, and the Framers of the Law of *England* in particular, have ever thought it most expedient and safe to consider as Deviations from the general Law ; to be made at the peril of the Persons acting, and to be explained in the Exception, and defended in the Exercise, by the Allegation and Proof of those extraordinary Circumstances, which the Minority argued might justify, but ought always to accompany such Cases. They alleged that extraordinary Provisions might else be extended to *all* Times, and an Authority, granted reluctantly even in the Minute of *imminent Danger*, might, in secure Peace, be made destructive to Freedom.

This

This Method of Reasoning is the more conclusive, because no Danger can follow to the Servants of the Crown from leaving the Law upon this Footing; for should a Secretary of State, upon Intelligence of any Crime, really formidable to the Commonwealth, and of a Nature requiring Dispatch and Secrecy, be under a Necessity of issuing such a Warrant as is now complained of; and should His Messengers, in pursuit of the Offenders, take up an innocent Man; is it reasonable to suppose, that any Jury would be found so narrow in Their Notions of Government, as not to attend to a Distinction clearly made and well supported upon the peculiar Circumstances of such a Crisis? Or should Prejudice or Ignorance influence the Determination of Juries, would not the Officers thus suffering for the Public be relieved by the Interposition of Parliament?

Let us recollect, what has passed in the Matter now depending. The Warrant itself has been generally held illegal. The offence against the State was no higher than publishing a Libel: No Circumstances to make a general Warrant necessary in the Method of apprehending the Author: The
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Proceedings in the Execution of it aggravated by every Circumstance of Wantonness, Negligence and Oppression: and nevertheless, it has not yet incurred the Censure of Parliament. Where then would be the Difficulty of Defence, *in a Case* which *had* Circumstances of *real* Justification to allege, or in which a Warrant, not strictly legal, could be shewn *to have been necessary*, or the Danger imminent? Thus many in the Minority reasoned, and, thus reasoning, They proved Themselves the true and *temperate* Friends of Liberty, no less when They refused, by regulating this Power, to furnish it with the Sanction of a Statute, than when They proposed, by a declaratory Motion, grounded in the Circumstances of a Transaction before Them, to confirm, as far as the Resolution of one House would go, the common Law of the Land; leaving the Use of Warrants, which, in the Case before Them, had no Justification, but were supposed to be possibly necessary in other Cases, at present by Them neither condemned nor justified, to be hereafter censured or excused, as the same Law should decide, and such Cases should require. But in one part of this Praise, let not the Ministry be deprived of Their just Share; for no real Design of
passing

passing the Bill appeared amongst Them ; Sir *John Philipps* himself opening cursorily the Regulations of this Bill, had the ill Fortune to make little Impression upon the Body even of the Majority of the House, and the whole Conduct of the Day fully demonstrated, that it was thought, even by that Majority, to be a doubtful Proposition, resulting more from a Sense of Shame, than any serious or concerted Plan of either vindicating the Law or establishing the ancient hereditary Right of the Subject against future similar Oppression.

Another Reason alleged to prove the Minority not sincere in their Wishes to secure the Freedom of the Subject, is drawn from Their Proceeding *by Motion* in the House of Commons. But it is difficult to comprehend the Force of this singular Objection. Perhaps these Writers do not know, that nothing is more usual or regular, in both Houses of Parliament, than to take up important Matters of public Administration separately in either House ; to express the Sense of that House by a general Resolution, and, upon that Resolution, to bring in a Bill. If this be real Ignorance of the Subject, and not contrived to mislead the Public
upon

upon so national a Question, "*by Hardiness in propagating false Facts,*" by substituting a Motion never made, in the Place of a Motion moved in the House of Commons, by sacrificing the Characters of the Minority, the fair Report of the Proceedings of the Commons of *England*, and Truth itself, to Their own vain and impracticable Hope of vindicating an embarrassed, and, *in that Day*, vanquished Administration; perhaps they will forgive a Stranger, if he should for Their Satisfaction, and for clearing this Part of the Argument, favour Them with some, out of many, Instances of this Method of Proceeding, and supply Them with that Knowledge Their Friends have so unfairly concealed.

They have forgot to apprize Them of the Case of Lord Chief Justice *Keeling* in the Reign of *Charles* the Second, * when, *upon the Information of a private Member of the House*, of illegal Acts committed by the Chief Justice in the Treatment of Juries, the House ordered him to attend at the Bar, and find-

* Commons Journals, 13 December 1667. A. Gray's Debates.

finding the Chief Justice, defending himself by Precedents, the Practice of the Courts, and the Opinion of the Judges, They accepted those Authorities *in excuse of the Judge, whom They accordingly discharged*, but They came to the following Resolution, “ Resolved, that the Precedents and Practice of fining Juries is illegal.”

It may not be improper to observe that, in this Case, the Commons proceeded upon the Information of a private Member of the House, stating a public Grievance : That They proceeded *by Resolution* : That They decided against *Precedents and Practice*, and the *Opinion of the Judges* : And that They thought it not inconsistent to condemn the *Thing* and *acquit the Person*.

They should have been informed also, that in 1689 *, upon Complaint made to the House of the Custody of the Earl of Danby, by a Warrant issued by Secretary Nottingham, the House calling for the Warrant, and finding that it bore *Date one Day before* the Information given, and receiving

* Commons Journals, 28 June 1689.

no satisfactory Answer upon the Point from the Secretary of State, resolved, That the taking Lord *Danby*, by *that Warrant*, was illegal.

That in 1680 *, Chief Justice *Scroggs*, having issued several general Warrants, empowering *Officers* and *Their Assistants*, from Time to Time, to seize and take into Custody *all Persons*, whom they shall suspect of writing and publishing seditious Libels, &c. the Commons, in this Instance, also, interposed, and, by Resolution, declared the said Warrants to be *arbitrary* and *illegal*; and thereby taught that despotic and corrupt Judge, who, in his Age, perhaps affected to regard the Resolutions of either House of Parliament no more than the Resolutions of a Parcel of drunken Porters, that the just Resentment of Parliament, will, in all Cases, sooner or later, overtake the Enemies, and vindicate the Constitution of these Kingdoms.

More Instances, I am assured, of the same Kind might be urged in Justification

* Commons Journals, 23 December 1680.

of the Interposition of the Commons in Cases of this Nature, of the Proceeding by Resolution in the first Instance, and of the Motion for censuring the general Warrants, by a Declaration of their Illegality ; but the Strength of Precedents turns not so much upon the Number, as upon the Application of them.

I Trust the Cases I have cited will be thought apposite, if not each separately to every Point, yet, in the whole and taken together, conclusive to every material Circumstance in the Proceeding of the last Year ; and therefore I will finish this Part of my Answer with remarking, that such was the Opinion of the House of Lords in 1640 *, of these general Warrants, such *Their* Idea *then* of Their Jurisdiction, and such Their Jealousy *then* of Their personal Freedom, that, the Papers of two of their own Members having been seized, under one of these Warrants, They declared it a Breach of Privilege ; the Officer executing it was brought upon his Knees

* Parliamentary History, Vol. IX. P. 34, 35, 36, 37. Rapin, Vol. X. P. 420. Whitelock, P. 37.

at the Bar, and Satisfaction was made to the injured Lords *. In 1692, in the Case of Lord *Marlborough*, confined without legal Evidence, it was resolved, that the Power exercised in *that* Case was *illegal*. And it was also resolved, that the Resolutions of the House be entered in the Books, as a *standing Direction to all future Judges*, and to cut off all Excuse for any such Illegalities in Times to come †. And let it not be forgot, that the Commons, in the same Year, rejected a Bill sent down to them by the Lords, and grounded upon the Case of Lord *Marlborough*, “for indemnifying Secretaries of State for such Commitments in *treasonable* Cases, and to limit Their Powers by Law ;” the House of Commons *then* reasoning, and prudently acting, upon the

* It appears from *Rapin*, *Whitelock*, and others, that the Pockets and Studies of these Lords were searched upon the Suspicion of holding Correspondence with the *Scots*, then actually in Arms, and that their Persons were not taken into Custody, even upon this Charge; and in those Times; and the whole Proceedings of the Lords in Resentment of this, which they *then* hold to be a Breach of their Privilege, are related at large in the Parliamentary History.

† Lords Journals, 14 Nov. 1692.

same

same Principles, and with the *same Discretion*, which are in *these Times resented and condemned* in the late Minority, following the Example of Their Ancestors in a Case very similar †.

It is not unpleasant to observe, how earnestly the Writers upon this Subject labour to make the *Case* of Mr. *Wilkes* pass for the *Cause* of Opposition, and to represent Him not only as the Idol, but as the Object of the Minority in the Stand They made upon this very Question. Yet if I may be allowed to make a Remark upon the Wisdom of this Plan, I think it is rather deficient. The Kingdom has been tried upon this Topic, and the Art has failed : The Man-

† The Debate went off in a Bill, that *indemnified* the Ministry for those Commitments, *but limited them* for the future by several Rules ; all which Rules were rejected by the Commons. They thought those Limitations gave a *legal Power* to commit, in Cases where they were observed ; whereas they thought the safer way was to *indemnify the Ministry*, when it was visible they did not commit any but upon a real Danger, and not to set them *any Rules* : Since as to the committing of suspected Persons, *where the Danger is real and visible*, the public Safety must be first looked to, and supersede all particular Laws. Burnet, Vol. 2. P. 103.

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her of the Expulsion, the Conduct of Numbers now in the Minority, uniformly kept throughout that Enquiry, and the Evidence of Time, all confute the Calumny ; inso-much that one should think the Ministers Themselves would advise these Writers another Time not to hang upon a Topic, which They have long ago called in, and at first perhaps urged so warmly, more from an officious, and, I am confident, a vain Hope of soothing the Mind of one Man, by an Attack upon his nearest Relations, than with any serious Expectation of being able to make the late Minority pass, either in this Age or in the Judgment of Posterity, for the factious Suite of any Man : A Minority composed (as it certainly was upon that Day) of Men, whose Ancestors, in their Times, and of others, who, in their own Persons, have most eminently contributed to the defence of this Constitution and Country, against foreign and domestic Enemies, from the Revolution to this Hour.

I have now gone through the several Assertions of these injudicious Advocates, who, guided by an Intemperance similar to that, which lately urged Their Patrons to advise the Dismission of General *Conway*, have, in
this

this Instance, as Their Patrons did in the other, revived a just and general Discontent, which might else, probably, have subsided in this inconstant Country.

Yet to conclude here, would not be adequate to the Cause; nor indeed would it be justice to the Persons injured. The same Public, which has seen the 220 calumniated Members of the late Minority charged with so many Things, which They never did, and with Designs, which they never formed, should now be fully and fairly informed of Their *actual* Conduct, and Their *real* Views, in moving the Question of the Legality of the Warrants.

Let Those then learn, if there be any yet sensible to the Feelings, and open to the Call of national Liberty, that it appearing, in the Course of the Proceedings against *Wilkes*, that a Subject had been taken into Custody by a general Warrant of Apprehension, issued by Lord *Halifax*, his Papers seized, and his Person kept in closest Custody, *upon the Charge of a seditious Libel*, the Public instantly took the Alarm, and the Illegality of *such* Warrants, and *such* Custody, in *such* an Offence, became universally the Topic
of

of Discourse, and Ground of Apprehension and Complaint. When therefore the Proceedings against Mr. *Wilkes* were finished, *when the Honour of the Crown and the Dignity of Parliament, traduced and injured* by the licentious Paper complained of, were both *vindicated* and satisfied, and not till after the Expulsion ; two Gentlemen of distinguished Worth, Talents and Consequence in Their Country, stepped forth ; expressed their Opinion of the Illegality of the Proceedings of Lord *Halifax*, and took that Method, which to Them seemed the best, of bringing the great Question, which had so much interested the Minds of all Ranks of Men, and upon which, They alleged, They thought the Essence of private and personal Liberty depended, to an amicable Debate and candid Discussion, for the Satisfaction of this Age, and, as They trusted, for the Security of future Times.

The House adopted the Idea : The Administration acquiesced ; a Day was named ; the Ministry called for various Papers, and Volumes of Records ; and when the Hour of Debate came on, Sir *William Meredith* moved the following Question.
 “ That a general Warrant for apprehending
 ing

ing and seizing the Authors, Printers and Publishers of a seditious Libel, together with Their Papers, is not warranted by Law."

It is said, and universally believed, that in the Debate neither the Minister himself, nor the Attorney General defended the Legality of the Warrant. The M. of G. and many others who voted for adjourning the Debate, expressly declared Their detestation of the Practice, and Their Sense of the Necessity of preventing a Measure so dangerous to Liberty ; and the whole Defence of that Day consisted in arguing upon the Impropriety of deciding in Parliament a Question then depending in a Court of Judicature. They, who maintained the Propriety and Necessity of the Motion, endeavoured to shew the Fallacy of this reasoning, and dwelt upon the Importance of the Question, the Violence of the Proceeding, the Power of Parliament *exercised in similar Cases*, and the Reproach of leaving the Liberty of the Subject, in a Case of such Notoriety, suspended by a Court of Law, upon the Pretence of Bills of Exceptions, *which, when examined, would be found to turn upon other Points*, and where the De-

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cision

cision, in this Matter of universal Interest, might be long kept in suspense, at the will even of the very Party accused. Upon a Motion being made for adjourning the Debate for four Months, the Numbers were found to be 234 for the Question and 220 against it; by which this great constitutional Question, perhaps the most important that ever animated the Spirit of a free People, has been put, as it is now phrased, into a *due* course of Trial at Law; in consequence of which *candid Reference* every Method has been taken, to delay the Suit and to avoid Decision. Some seem to think it not impossible, that the Cause may be thus put off till the next Session, in which Case I am free to declare, I think the Minority of 220 will deserve every Calumny, which They have hitherto undeservedly borne, if They do not make this great Question the very first Measure of the Year; hopeless, as the Public would then be, of any Redress or Decision, from the Candor of the Minister, or from the course of Law.

Thus this great Question took its rise, thus the Minority moved it, the Ministry avoided it, the House referred it, the Ser-
vants

vants of the Crown have prosecuted it in the Courts below, and in this Situation our most essential Liberty, our undoubted Birth-right, *stands*, I beg Pardon, *hangs* at this Hour. For at this instant of Time, Lord *Halifax* from a Perseverance (*which some would celebrate for true Spirit*) may issue out another general Warrant, upon the Pretence of *the last Libel the Budget* ; by that Warrant he may order, as he before did, six Messengers, his official Instruments, without Knowledge to guide, or Property to restrain Them, in the abuse of unlimited Power, to enquire for the Author of that seditious Work also, and to seize on any Person, *whom They may think proper*, and His Papers ; and what Law remains in *allowed Force at this instant* to deter Them from seizing, upon the ground of received Opinion, the Person of that Honourable Gentleman, whom some People allege They know, and many believe, to have been, in part at least, the Author of that excellent and unanswered Work ? from entering *His House* abruptly, alarming *His Family*, keeping Him in close Custody, tumbling His most secret and confidential Papers and Deeds carelessly *into a Sack*, as in the former Instances, and trusting them to the Hand of a common and unresponsible Person, without Schedule or
Security

Security for recovery of them ? In this Case it is true, the Outcry would be great and general, from the Character of the Person thus treated ; His ancient Family ; His *extensive* ; though concealed *Generosity*, and his Popularity in that large, manufacturing, and wealthy County, which He represents with such entire Satisfaction to His Constituents, and so much Reputation to Himself. But, on the other Hand, what would not Lord *Halifax* have to say in His Defence ? It would now be alleged in His Favour, not only that there are numberless Precedents upon the File of Office, in Justification of this Practice, and that, if it be not legal by the written Letter of the Statute Law, it is Law grown out of long usage, “ but that the House of Commons, in the very last Winter, thought it so necessary a Power in Magistracy, that they refused to condemn or to abrogate it.” It would be confidently asked, “ whether their Acquiescence in the Exercise of it, upon an *express Motion*, and after long Debate, does not prove, that they thought the Power itself neither illegal nor dangerous ? Whether, after this Sanction given to it by the Indecision and Reference of the House of Commons, it is not to be considered as Law, until the Courts of Judicature have pronounced it is not ? It is the
Duty

Duty of Magistrates fully to exert whatever Authority is vested in them, for the *Neglect* of which They are accountable, as well as for the Abuse: And, however Lord *Halifax* might have hesitated upon the Legality of general Warrants *before the Question came under Consideration of the Commons* last Year, *from his own Doubts of the Validity of Precedents of Office, to constitute Law against the Temper of the Constitution and the Freedom of the Subject*; yet *at this Time*, a Secretary of State stands *obliged* to consider this Practice of Office as authorised by the Consent and Sanction of the two Houses of Parliament given to the Continuance of it, until it shall be annihilated judicially." This would certainly be his Vindication, and, I think, a very plausible, if not a sufficient one. Beside, the Rank of the Person makes no Difference in the Outrage, though it would in the public Reception of it. The Law is no Respector of Persons; the Libel of a Man of Parts, of Rank and Esteem, is more dangerous, than that of an inferior; the same Reasoning and the same Precedents, that justified one, must be admitted in Justification of the other; and *this* may be done upon every Reason, upon which *that* was done, as the Law now stands, and suspended as the Determination

termination is now unhappily left. To prevent this Uncertainty in so fundamental an Article of our Constitution, in which, in their Judgment, *to be in Doubt* is to be *in Danger*, the 220 calumniated Members of the Minority honourably, tho' ineffectually contended. And let the impartial Public now decide, whether they are most indebted to those, who laboured to bring this Their great Interest to an immediate Determination, or to the 234 Members of the Majority of that Day, who prevailed in having it referred to a future Trial at Law: A method of Decision, which, it seems neither the Importance of the Question, nor the Recollection of the most solemn Assurances, given in full Senate, nor the utmost Endeavours of the Party injured, nor the ordinary Jurisdiction of the Court of Common Pleas, nor the Authority of the illustrious and truly Patriot Judge presiding in that Court, have, as yet, been sufficient to bring on.

F I N I S.

THE
T R I A L
O F
JOHN PETER ZENGER,
OF NEW-YORK, PRINTER:

Who was charged with having printed and published
a Libel against the Government, and acquitted.

A NARRATIVE OF HIS CASE.

To which is now added, being never printed before,

THE HISTORY OF THE CASE OF
OF

MR. WILLIAM OWEN,
BOOKSELLER, near TEMPLE-BAR,

Who was also Charged with the Publication of a LIBEL
against the GOVERNMENT; of which he was honour-
ably acquitted by a Jury of Free-born Englishmen,
Citizens of London.



L O N D O N :
Printed for J. ALMON, opposite Burlington-House, Piccadilly.
MDCC LXV.
[Price One Shilling.]

IN an age of persecution, when few people dare to write, and fewer still to print, these Trials ought to be universally read by every TRUE FRIEND TO ENGLISH LIBERTY; who will here see two of the most noble stands which have been made since the Revolution, in DEFENCE of CONSTITUTIONAL FREEDOM. As meriting that Notice, Zenger's Trial (of which this is a new Edition, it having been for some time very scarce) has been lately recommended, in the strongest terms, by some of the most able, as well as the most honest men now living.

A

NARRATIVE

OF THE CASE OF

JOHN PETER ZENGER,

Printer of the New-York Weekly Journal.

ZENGER's first News-paper was printed, Nov. 5, 1733, and he continued printing and publishing them, to the public satisfaction, till the January following; when the chief justice was pleased to animadvert upon the doctrine of libels, in a long charge given in that term to the grand jury, of which Zenger's papers was the principal object; and afterwards on the third Tuesday of October, 1734, was again pleased to harangue the grand jury, in the following words:

"I shall observe concerning libels; that they are arrived to that height, that they call loudly for your animadversion; it is high time to put a stop to them; for at the rate things are now carried on, when all order and government are endeavoured to be trampled on, and reflections are cast upon persons of all degrees, must not these things end in sedition, if not timely prevented? Lenity, you have seen, will not avail; it becomes you then to enquire after the offenders, that we may, in a due course of law, be enabled to punish them. If you, gentlemen, do not interpose, consider whether the ill consequences that may arise from any disturbances of the public peace, may not in part lie at your door?"

But the grand jury not indicting Zenger, as was expected, the gentlemen of the council * took four of his news-papers into consideration, and having by their resolution declared them to be *faux*,
scandalous

* As some of our readers may perhaps be unacquainted with the form of government in New-York, we must inform them, that in that province, as well as most of the British plantations in America, the form of government is the very same with that in England; as it consists of a governor, a council, and an assembly. The governor is named by the king, and represents the sovereign within the province of which he is appointed governor: the council consists of a certain number of members, all of whom are named by the king, and resembles the house of lords in England, being for that reason sometimes called the upper-house of assembly; and the assembly consists of a number of representatives chosen by the people in their several parishes or districts, resembling the house of commons in England, and for that reason are often called the lower-house of assembly. These three branches of the legislature have, within their province, the same powers and privileges that the
king,

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scandalous, malicious and seditious libels, ORDERED them to be burnt by the hands of the common hangman; but when the order came to be read in the court of quarter sessions, the aldermen would not suffer the hangman to burn them, and made the following protest against it, which was read:

“Whereas this court conceives, they are only to be commanded by the king’s mandatory writs, authorized by law, to which they conceive they have the right of shewing cause why they don’t obey them, if they believe them improper to be obeyed, or by orders, which have some known laws to authorize them; and as this court conceives this order to be no mandatory writ warranted by law, nor knows of any law that authorizes the making of the order aforesaid; so they think themselves under no obligation to obey it: which obedience, they think, would be in them, the opening a door for arbitrary commands, which, when once opened, they know not what dangerous consequences may attend it. Wherefore, this court conceives itself bound in duty (for the preservation of the rights of this corporation, and, as much as they can, of the liberty of the press, and the people of the province, since an assembly of the province, and several grand juries, have refused to meddle with the papers, when applied to by the council) to protest against the order aforesaid, and to forbid all the members of this corporation to pay any obedience to it, until it be shewn to this court, that the same is authorized by some known law, which they neither know nor believe that it is.”

The sheriff then moved, that the court would direct the hangman to perform the order of the council; to which it was answered, That, as he was an officer of the corporation, they would give no such order. Whereupon the sheriff ordered his own negro to burn them, and the officers of the garrison attended.

On Sunday November 17, 1734, Zenger was taken up and imprisoned by virtue of a warrant in these words:

“At a council held at Fort-George in New-York, the 2d day of November, 1734.

P R E S E N T.

His excellency William Cosby, captain-general and governor in chief, &c.

Mr. Clarke,
Mr. Kennedy,
Mr. Lane,

Mr. Harrison,
The chief justice,
Mr. Horsmanden,

Mr. Livingston,
Mr. Cortland,

king, lords and commons have here at home, and their acts have the same force, if not disapproved by his majesty; consequently a resolution of either house of assembly meets generally with the same respect from the people within the province, that a resolution of either house of parliament does in England; but in this case of Zenger’s, tho’ the council had by their resolution declared the papers published by him to be false, scandalous, malicious and seditious libels, as the jury upon his trial were upon their oaths, and thereby bound to deliver their own opinion, and not that of the council, they thought themselves obliged to acquit the prisoner, by returning a verdict, not guilty; which is the verdict every jury-man is in conscience bound to return, if he thinks that the prisoner is not guilty of the crime charged in the indictment or information.

“It

" It is ordered, that the sheriff for the city of New-York, do forthwith take and apprehend John Peter Zenger, for printing and publishing several seditious libels, dispersed throughout his journals or news-papers, entitled, The New-York Weekly Journal, containing the freshest advices, foreign and domestic; as having in them many things, tending to raise factions and tumults among the people of this province, inflaming their minds with contempt of his majesty's government, and greatly disturbing the peace thereof; and, upon his taking the said John Peter Zenger, to commit him to the prison or common gaol of the said city and county.

Fred. Morris, D. Cl. Con."

By virtue of this warrant he was imprisoned several days; and illegally, as well as cruelly denied the use of pen, ink and paper, and the liberty of speech with any persons.—Upon his commitment, some friends soon got a habeas corpus to bring him before the chief justice, in order to his discharge or being bailed; on the return whereof, on Wednesday the 20th of November, his council delivered exceptions to the return, and the chief justice ordered them to be argued publicly at the city hall, on the Saturday following.

On Saturday the 23d of November, the said exceptions came to be argued, by James Alexander and William Smith, council for Zenger; and by Mr. Attorney-general and Mr. Warrel, council against him, in presence of some hundreds of the inhabitants; where his council (saving the benefit of exception to the illegality of the warrant) insisted, that he might be admitted to reasonable bail. And to shew, that it was his right to be so, they offered Magna Charta, the petition of Right 3 car. The habeas corpus act of 31 car. 2. which directs the sum in which bail is to be taken, to be, " according to the quality of the prisoner, and nature of the offence." Also 2d Hawkins, Cap. 15. §. 5. in these words, "*But Justices must take care, that, under pretence of demanding sufficient security, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked on as a great grievance, and is complained of as such, by 1. W. & M. sess. 2d. by which it is declared, That excessive bail ought not to be required.* It was also shewn, that the seven bishops, who, in king James the 1st's time, were charged with the like crime that Zenger stood charged with, were admitted to bail on their own recognizances, the archbishop in 200l. and each of the other six in 100l. each only. Sundry other authorities and arguments were produced and insisted on by council, to prove his right to be admitted to moderate bail, and to such bail as was in his power to give; and sundry parts of history they produced, to shew how much the requiring excessive bail had been resented by parliament. And in order to enable the court to judge what surety was in his power to give, he made affidavit, that (debts paid) he was not worth forty pounds, the tools of his trade and wearing apparel excepted.

Some warm expressions (to say no worse of them) were dropped on this occasion, sufficiently known and resented by the auditory.

But upon the whole, it was ordered, That he might be admitted to bail, himself in 400l. with two sureties each in 200l. and that he should be remanded till he gave it. And as this was ten times more than was in his power to counter secure any person in giving bail for him, he conceived he could not ask any to become his bail on these terms; and therefore he returned to gaol, where he lay until Tuesday the 28th of January 1735, being the last day of that term; and the grand jury having found nothing against him, he expected to have been discharged from his imprisonment: but these hopes proved vain; for the attorney-general then charged him by information, for printing and publishing parts of his journals, No. 13. and 23. as being false, scandalous, malicious, and seditious.

To this information his council appeared, and offered exceptions, leaving a blank for inserting the judges commissions, which the court were of opinion not to receive till those blanks were filled up. In the succeeding vacation the judges gave copies of their commissions; and on Tuesday the 15th of April 1735, the first day of the succeeding term, his council offered these exceptions; which were as follow:

The attorney-general,	} On information for a
v.	
John Peter Zenger.	} misdemeanor.

“ Exceptions humbly offered by John Peter Zenger, to the honourable James De Lancey, Esq; to judge in this cause.

“ The defendant comes and prays hearing of the commission, by virtue of which the honourable James De Lancey, Esq; claims the power and authority to judge in this cause, and it is read to him in these words:

“ George the Second, by the grace of God, king of Great-Britain, France and Ireland, king, defender of the faith, &c. To our trusty and well-beloved James De Lancey, Esq; we reposing special trust and confidence in your integrity, ability and learning, have assigned, constituted and appointed, and we do by these presents assign, constitute and appoint you the said James De Lancey, Esq; to be chief justice in and over our province of New-York, in America, in the room of Lewis Morris, Esq; giving and by these presents granting unto you full power and lawful authority, to hear, try, and determine all pleas whatsoever, civil, criminal and mixed, according to the laws, statutes and customs of our kingdom of England, and the laws and usages of our said province of New York, not being repugnant thereto, and executions of all judgments of the said court to award, and to make such rules and orders in the said court as may be found convenient and useful, and as near as may be agreeable to the rules and orders of our courts of King's-Bench, Common Pleas, and Exchequer in England. To have, hold and enjoy the said office or place of chief justice in and over our said province, with all and singular the rights, and privileges, profits and advantages, salaries, fees and perquisites

quisites unto the said place belonging, or in any ways appertaining, in as full and ample manner as any person heretofore chief justice of our said province hath held and enjoyed, or of right ought to have held and enjoyed the same, to you the said James De Lancey, Esq; for and DURING OUR WILL AND PLEASURE. In testimony whereof we have caused these our letters to be made patent, and the great seal of our province of New-York, to be hereunto affixed. Witness our trusty and well-beloved William Cosby, Esq; our captain-general and governor in chief of our provinces of New-York, New-Jersey, and the territories thereon depending in America, vice admiral of the same, and colonel in our army, at Fort-George in New-York, the twenty-first day of August, in the seventh year of our reign, Anno Domini, 1733."

Which being read and heard, the said John Peter Zenger, by protestation, not confessing or submitting to the power of any other person to judge in this cause, doth except to the power of the honourable James De Lancey, Esq; aforesaid, to judge in this cause, by virtue of the commission aforesaid, for these reasons, viz.

" 1st. For that the authority of a judge of the King's-Bench, in that part of Great Britain called England, by which the cognizance of this cause is claimed, is by the said commission granted to the honourable James De Lancey, Esq; aforesaid, only *during pleasure*; whereas that authority (by a statute in that case made and provided) ought to be granted *during good behaviour*

" 2d. For that, by the said commission, the jurisdiction and authority of a justice of the court of Common-Pleas at Westminster, in that part of Great Britain called England, is granted to the said James De Lancey, esq; which jurisdiction and authority cannot be granted to, and exercised by, any one of the justices of the King's-Bench.

" 3d. For that the form of the said commission is not founded on or warranted by the common law, or any statute of England, or of Great-Britain, or any act of assembly in this colony.

" 4th. For that it appears by the commission aforesaid, that the same is granted under the seal of this colony, by his excellency William Cosby, esq; governor thereof; and it appears not, that the same was granted, neither was the same granted, by and with the advice and consent of his majesty's council of this colony; without which advice and consent, his excellency could not grant the same.

" Wherefore, and for many other defects in the said commission, this defendant humbly hopes, that the hon. James De Lancey, esq; will not take cognizance of this cause, by virtue of the commission aforesaid.

Signed, { James Alexander,
William Smith."

The exceptions to the commission of the hon. Frederick Philipse, esq; the second justice, were the same with the foregoing; his commission having the same defects.

Tuesday the 15th of April, 1735, Mr. Alexander offered the above exceptions to the court, and prayed that they might be filed.

Upon

Upon this the chief justice said to Mr. Alexander and Mr. Smith, that they ought well to consider the consequences of what they offered; to which both answered, that they had well considered what they offered, and all the consequences. And Mr. Smith added, that he was so well satisfied of the right of the subject to take an exception to the commission of a judge, if he thought such commission illegal, that he durst venture his life upon that point. As to the validity of the exceptions then offered, he said, he took that to be a second point; but was ready to argue them both, if their honours were pleased to hear him. To which the chief justice replied, that he would consider the exceptions in the morning; and ordered the clerk to bring them to him.

Wednesday, the 16th of April, 1735, The chief justice delivered one of the exceptions to the clerk, and justice Philipse the other, upon which Mr. Smith arose and asked the judges, whether their honours would hear him upon these two points. 1st, That the subject has a right to take such exceptions, if they judged the commission illegal. 2dly, That the exceptions tendered were legal and valid. To which the chief justice said, that they would neither hear nor allow the exceptions; for (said he) you thought to have gained a great deal of applause and popularity by opposing this court, as you did the court of Exchequer; but you have brought it to that point, that either we must go from the bench, or you from the bar: therefore we exclude you and Mr. Alexander from the bar; and delivered a paper to the clerk, and ordered it to be entered, which the clerk entered accordingly, and returned the paper to the chief justice; after which, the chief justice ordered the clerk to read publicly what he had written; an attested copy whereof follows:

“ At a supreme court of judicature held for the province of New-York, at the city-hall of the city of New-York, on Wednesday, the 16th day of April, 1735.

P R E S E N T.

The hon. James De Lancey, esq; chief justice.

The hon. Frederick Philipse, esq; second justice.

“ James Alexander, esq; and William Smith, attornies of this court, having presumed (notwithstanding they were forewarned by the court of their displeasure if they should do it) to sign, and having actually signed, and put into court, exceptions, in the name of John Peter Zenger; thereby denying the legality of the judges their commissions (tho’ in the usual form) and the being of this supreme court. It is therefore ordered, that for the said contempt, the said James Alexander, and William Smith, be excluded from any farther practice in this court; and that their names be struck out of the roll of attornies of this court.

per Cur’.

James Lyne, Cl.”

Mr. Alexander observed to the court, upon reading the above order, that they were mistaken in their wording of it, because the exceptions were only to their commissions, and not to the being of the court, as is therein alleged; and prayed that the order might be altered accordingly. The chief justice said, they conceived the exceptions

exceptions were against the being of the court. Both Mr. Alexander and Mr. Smith denied that they were, and prayed the chief justice to point to the place that contained such exceptions ; and further added, that the court might well exist, tho' the commissions of all the judges were void ; which the chief justice confessed to be true : and therefore they prayed again, that the order in that point might be altered ; but it was denied.

Upon this exclusion of Zenger's council, he petitioned the court to order council for his defence, who thereon appointed John Chambers, esq; who pleaded Not Guilty for him to the information. Mr. Chambers moved, that a certain day in the next term might be appointed for his trial, and for a struck jury ; whereupon his trial was ordered to be on Monday the 4th of August, and the court would consider till the first day of the next term, whether he should have a struck jury or not, and ordered that the sheriff should in the mean time, at Zenger's charge, return the freeholders book.

On the 29th of July, 1735, being the first day of next term, the court were of opinion, That Zenger was entitled to have a struck jury.

Accordingly, that evening at five of the clock, some of his friends attended the clerk, for striking the jury ; when, to their surprize, the clerk, instead of producing the freeholders book, to strike the jury out of it, in their presence, as usual, produced a list of forty-eight garbled persons, whom, he said, he had taken out of the freeholders book. Zenger's friends told him, that a great number of these persons were not freeholders ; that others were persons holding commissions and offices at the governor's pleasure ; that others being of the late displaced magistrates of this city, must be supposed to have resentment against the prisoner, for what he had printed concerning them ; that others were the governor's baker, taylor, shoemaker, candle-maker, joiner, &c. that there would not remain a jury, if they struck out all the exceptionable men ; and, according to the custom, they had only a right to strike out 12.

But, finding no arguments could prevail with the clerk to strike the jury as usual, Mr. Chambers applied to the court, next morning, and the court, upon his motion, ordered, That the 48 should be struck out of the freeholders book as usual, in the presence of the parties, and that the clerk should hear objections to persons proposed to be of the 48, and allow of such exceptions as were just. In pursuance of that order, a jury was that evening struck, to the satisfaction of both parties.

THE
T R I A L
OF
JOHN PETER ZENGER,
AUGUST 4, 1735.

AT a supreme court of judicature held for the province of New-York,

P R E S E N T,

The Hon. James De Lancey, Esq; chief justice.

The Hon. Frederick Philips, Esq; second justice.

The court being seated, Zenger was brought in.

Mr. Chambers, council for the defendant. I humbly move your honours that we may have justice done by the sheriff, and that he may return the names of the jurors in the same order they were struck.

Chief Justice. How is that? Are they not so returned?

Mr. Ch. No, they are not: for some of the names that were last set down in the pannel, are now placed first.

Ch. J. Make out that, and you shall be righted.

Mr. Ch. I have the copy of the pannel in my hand, as the jurors were struck, and if the clerk will produce the original signed by Mr. Attorney and myself, your honour will see our complaint is just.

Ch. J. Clerk, is it so? Look upon that copy: is it a true copy of the pannel as it was struck?

Clerk. Yes, I believe it is.

Ch. J. How came the names of the jurors to be misplaced in the pannel?

Sheriff. I have returned the jurors in the same order in which the clerk gave them to me.

Ch. J. Let the names of the jurors be ranged in the order they were struck, agreeable to the copy here in court.

Which was done accordingly. And the jury, whose names were as follows, were called and sworn.

Hermanus Rutgers,
Stanly Holmes,
Edward Man,
John Bell,
Samuel Weaver,
Andries Marfchalk,

Egbert van Borfom,
Thomas Hunt, Foreman.
Benjamin Hildreth,
Abraham Keteltas,
John Goelet,
Hercules Wendover.

Mr.

Mr. Attorney-general opened the information, which was as follows :

“ New-York, supreme court.

“ Of the term of January, in the eighth year of the reign of our sovereign lord king George IId, &c.

“ New-York, ss. **B**E it remembered, that Richard Bradley, Esq; attorney-general of our sovereign lord the king, for the province of New-York, who for our said lord the king in this part prosecutes, in his own proper person comes here into the court of our said lord the king, and for our said lord the king gives the court here to understand and be informed,—that John Peter Zenger, late of the city of New-York, Printer, (being a seditious person, and a frequent printer and publisher of false news and seditious libels, and wickedly and maliciously devising the government of our said lord the king of this his majesty's province of New-York, under the administration of his excellency William Cosby, Esq; captain-general and governor in chief of the said province, to traduce, scandalize and vilify; and his excellency the said governor, and the ministers and officers of our said lord the king of and for the said province to bring into suspicion and the ill opinion of the subjects of our said lord the king residing within the said province) the twenty-eighth day of January, in the seventh year of the reign of our sovereign lord George the Second, by the grace of God of Great-Britain, France and Ireland, king, defender of the faith, &c. at the city of New-York, did falsely, seditiously and scandalously print and publish, and cause to be printed and published, a certain false, malicious, seditious, scandalous libel, intituled, the New-York Weekly Journal, containing the freshest advices foreign and domestic*; in which libel (of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province) among other things therein contained, are these words: ‘ Your appearance in print at last gives a pleasure to many, tho’ most wish you had come fairly into the open field, and not appeared behind retrenchments made of the supposed laws against libelling, and of what other men have said and done before; these retrenchments, gentlemen, may soon be shewn to you and all men to be weak, and to have neither law nor reason for their foundation, so cannot long stand you in stead: therefore, you had much better as yet leave them, and come to what the people of this city and

* The Passages quoted in this information are from only two of Zenger's newspapers.

province (the city and province of New-York meaning) think are the points in question (to wit) They (the people of the city and province of New-York meaning) think, as matters now stand, that their LIBERTIES and PROPERTIES are precarious, and that SLAVERY is like to be intailed on them and their posterity, if some past things be not amended, and this they collect from many past proceedings.' (Meaning many of the past proceedings of his excellency the said governor, and of the ministers and officers of our said lord the king, of and for the said province.) And the said attorney-general of our said lord the king, for our said lord the king, likewise gives the court here to understand and be informed, That the said John Peter Zenger afterwards (to wit) the eighth day of April, in the seventh year of the reign of our said lord the king, at the city of New-York aforesaid, did falsly, seditiously and scandalously print and publish, and cause to be printed and published, another false, malicious, seditious, and scandalous libel, intituled, The New-York Weekly Journal, containing the freshest advice foreign and domestic. In which libel, (of and concerning the government of the province of New-York, and of and concerning his excellency the said governor, and the ministers and officers of our said lord the king, of and for the said province) among other things therein contained, are these words, ' One of our neighbours (one of the inhabitants of New-Jersey meaning) being in company, observing the strangers (some of the inhabitants of New-York meaning) full of complaints, endeavoured to persuade them to remove into Jersey; to which it was replied, that would be leaping out of the frying-pan, into the fire; for, says he, we both are under the same governor, (his excellency the said governor meaning) and your assembly have shewn with a witness what is to be expected from them: one that was then moving to Pensilvania, (meaning one that was then removing from New-York, with intent to reside at Pensilvania) to which place it is reported several considerable men are removing (from New-York meaning) expressed, in terms very moving, much concern for the circumstances of New-York, (the bad circumstances of the province and the people of New-York meaning) seemed to think them very much owing to the influence that some men (whom he called tools) had in the administration, (meaning the administration of government of the said province of New-York) said he was now going from them, and was not to be hurt by any measures they should take, but could not help having some concern for the welfare of his countrymen, and should be glad to hear that the assembly

assembly (meaning the general assembly of the province of New-York) would exert themselves as became them, by shewing that they have the interest of their country more at heart, than the gratification of any private view of any of their members, or being at all affected by the smiles or frowns of a governor, (his excellency the said governor meaning) both which ought equally to be despised, when the interest of their country is at stake. You, says, he, complain of the lawyers, but I think the law itself is at an end, *We* (the people of the province of New-York meaning) *See men's deeds destroyed, judges arbitrarily displaced, New courts erected without consent of the legislature* (within the province of New-York meaning) *by which it seems to me, trials by juries are taken away when a governor pleases,* (His excellency the said governor meaning) *Men of known estates denied their votes, contrary to the received practice, the best expositor of any law:* Who is then in that province (meaning the province of New-York) that call (can call meaning) any thing his own, or enjoy any liberty (liberty meaning) longer than those in the administration (meaning the administration of government of the said province of New-York) will condescend to let them do it, for which reason I have left it, (the province of New-York meaning) as I believe more will." To the great disturbance of the peace of the said province of New-York, to the great scandal of our said lord the king, of his excellency the said governor, and of all others concerned in the administration of the government of the said province, and against the peace of our sovereign lord the king, his crown and dignity, &c. Whereupon the said attorney-general of our said lord the king, for our said lord the king, prays the advisement of the court here, in the premises, and the due process of the law, against him the said John Peter Zenger, in this part to be done, to answer to our said lord the king of and in the premises, &c.

R. Bradley, attorney-general."

Mr. Ch. To this information the defendant has pleaded not guilty, and we are ready to prove it.

[Mr. Chambers was not pleased to favour Zenger with his notes, so that for fear of doing him injustice, his arguments cannot be set down. But here Mr. Chambers set forth very clearly the nature of a libel, the great allowances that ought to be made for what men speak or write: That in all libels there must be some particular persons so clearly pointed out, that no doubt must remain about who is meant: That he was in hopes Mr. Attorney would fail in his proof, as to this point;

and therefore desired that he would go on to examine his witnesses.

Then Mr. Hamilton, who, at the request of some of Zenger's friends, was so kind as to come from Philadelphia to assist him on his trial, spoke.

Mr. Hamilton. May it please your honour ; I am concerned in this cause on the part of Mr. Zenger, the defendant. The information against my client was sent me, a few days before I left home, with some instructions to let me know how far I might rely upon the truth of those parts of the papers set forth in the information, and which are said to be libellous. And tho' I am perfectly of opinion with the gentleman who has just now spoke, on the same side with me, as to the common course of proceedings, I mean in putting Mr. Attorney upon proving, that my client printed and published those papers mentioned in the information ; yet I cannot think it proper for me (without doing violence to my own principles) to deny the publication of a complaint, which I think is the right of every free-born subject to make, when the matters so published can be supported with truth ; and therefore I'll save Mr. Attorney the trouble of examining his witnesses to that point ; and I do (for my client) confess, that he both printed and published the two news-papers set forth in the information ; and I hope in so doing he has committed no crime.

Mr. Attorney. Then if your honour pleases, since Mr. Hamilton has confessed the fact, I think our witnesses may be discharged ; we have no further occasion for them.

Mr. Hamilton. If you brought them here, only to prove the printing and publishing of these news-papers, we have acknowledged that, and shall abide by it.

[Here Zenger's journeyman and two sons (with several others subpoena'd by Mr. Attorney, to give evidence against him) were discharged, and there was silence in the court for some time.]

Mr. Ch. Justice. Well, Mr. Attorney, will you proceed ?

Mr. Attorney. Indeed, Sir, as Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the king ; for supposing they were true, the law says that they are not the less libellous for that ; nay indeed, the law says their being true is an aggravation of the crime.

Mr. Hamilton. Not so neither, Mr. Attorney, there are two words to that bargain. I hope it is not our bare printing and publishing a paper, that will make it a libel : you will have something more to do, before you make my client a libeller ;

libeller; for the words themselves must be libellous, that is, "false, scandalous, and seditious," or else we are not guilty.

[As Mr Attorney has not been pleased to favour us with his argument, which he read, or with the notes of it, we cannot take upon us to set down his words, but only to shew the book-cases he cited, and the general scope of his argument, which he drew from those authorities. He observed upon the excellency, as well as use of government, and the great regard and reverence, which had been constantly paid to it, both under the law and the gospel. That by government we were protected in our lives, religion, and properties; and that, for these reasons, great care had always been taken to prevent every thing that might tend to scandalize magistrates, and others concerned in the administration of the government, especially the supreme magistrate. And that there were many instances of very severe judgments, and of punishments inflicted upon such, as had attempted to bring the government into contempt; by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority; to the great disturbance of the public peace. And to support this, he cited, 5 Coke 121. (It should be 125.) Wood's Instit. 430. 2 Lilly 168. 1 Hawkins 73. 11. 6. From these books he insisted, that a libel was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead; if he is a private man, the libeller deserves a severe punishment, but if it is against a magistrate or other public person, it is a greater offence; for this concerns not only the breach of the peace, but the scandal of the government; for what greater scandal of the government can there be, than to have corrupt or wicked magistrates to be appointed by the king, to govern his subjects under him? And a greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any concern in the administration of justice: and from the same books Mr. Attorney insisted, that whether the person defamed is a private man or a magistrate, whether living or dead, whether the libel is true or false, or if the party against whom it is made is of good or evil fame, it is nevertheless a libel: for in a settled state of government, the party grieved ought to complain for every injury done him, in the ordinary course of the law. And as to its publication, the law had taken so great care of mens' reputations, that if one maliciously repeats, or signs it, in the presence of another, or delivers the libel or a copy of it over, to scandalize the party, he is to be punished

punished as a publisher of a libel. He said it was likewise evident, that libelling was an offence against the law of God. Acts xxiii. 5. "Then said Paul, I will not, brethren, that he was the high-priest; for it is written, thou shalt not speak evil of the ruler of the people." 2 Pet. ii. 10. "Despise government, presumptuous are they, self-willed, they are not afraid to speak evil of dignities, &c." He then insisted, that it was clear, both by the law of God and man, That it was a very great offence to speak evil of, or to revile, those in authority over us; and that Mr. Zenger had offended in a most notorious and gross manner, in scandalizing his excellency our governor, who is the king's immediate representative, and the supreme magistrate of this province: for can there be any thing more scandalous said of a governor than what is published in those papers? Nay, not only the governor, but both the council and assembly are scandalized; for there it is plainly said, That "As matters now stand, their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity." And then again Mr. Zenger says, "The assembly ought to despise the smiles or frowns of a governor: That he thinks the law is at an end: That we see Mens' deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature: And that it seems trials by juries are taken away when a governor pleases: That none can call any thing their own, longer than those in the administration will condescend to let them do it."—And Mr. Attorney added, that he did not know what could be said in defence of a man, who had so notoriously scandalized the governor and principal magistrates and officers of the government, by charging them with depriving the people of their rights and liberties, and taking away trial by juries, and in short, putting an end to the law itself.—If this was not a libel, he said, he did not know what was one. Such persons as will take those liberties with governors and magistrates, he thought ought to suffer, for stirring up sedition and discontent among the people. And concluded by saying, That the government had been very much traduced and exposed by Mr. Zenger, before he was taken notice of: That at last it was the opinion of the governor and council, that he ought not to be suffered to go on to disturb the peace of the government, by publishing such libels against the governor and the chief persons in the government; and therefore they had directed this prosecution, to put a stop to this scandalous and wicked practice, of libelling and defaming his majesty's government and disturbing his majesty's peace.]

Mr.

Mr. Chambers then summed up to the jury, observing, with great strength of reason, on Mr. Attorney's defect of proof, that the papers in the information were false, malicious, or seditious, which was incumbent on him to prove to the jury, and without which they could not on their oaths say, That they were so; as charged.

Mr. Hamilton: May it please your honour; I agree with Mr. Attorney, that government is a sacred thing; but I differ very widely from him when he would insinuate, that the just complaints of a number of men, who suffer under a bad administration, is libelling that administration. Had I believed that to be law, I should not have given the court the trouble of hearing any thing I could say in this cause. I own, when I read the information, I had not the art to find out (without the help of Mr. Attorney's inuendos) that the governor was the person meant in every period of that news-paper; and I was inclined to believe, that they were wrote by some, who, from an extraordinary zeal for liberty, had misconstrued the conduct of some persons in authority into crimes; and that Mr. Attorney, from his too great zeal for power, had exhibited this information, to correct the indiscretion of my client; and at the same time, to shew his superiors the great concern he had, lest they should be treated with any undue freedom. But from what Mr. Attorney has just now said, to wit, That this prosecution was directed by the governor and council; and from the extraordinary appearance of people of all conditions, which I observe in court upon this occasion, I have reason to think, that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake, than I apprehend: and therefore, as it is become my duty, to be both plain and particular in this cause, I beg leave to bespeak the patience of the court.

I was in hopes, as that terrible court, where those dreadful judgments were given, and that law established, which Mr. Attorney has produced for authorities to support this cause, was long ago laid aside, as the most dangerous court to the liberties of the people of England, that ever was known in that kingdom; that Mr. Attorney, knowing this, would not have attempted to set up a star-chamber here, nor to make their judgments a precedent to us: for it is well known, that what would have been judged treason in those days for a man to speak, I think has since not only been practised as lawful, but the contrary doctrine has been held to be law.

In *Brewster's* case, for printing, That the subjects might defend their rights and liberties by arms, in case the king should go about to destroy them, he was told by the chief-justice, that it was a great mercy he was not proceeded against for his life; for that to say, the king could be resisted by arms in any case whatsoever, was express treason. And yet we see, since that time, Dr. Sacheverel was sentenced in the highest court of Great-Britain, for saying, That such a resistance was not lawful. Besides, as times have made very great changes in the laws of England, so, in my opinion, there are many good reasons that places should do so too.

Is it not surprising to see a subject, upon his receiving a commission from the king to be a governor of a colony in America, immediately imagining himself to be vested with all the prerogatives belonging to the sacred person of his prince? and, which is yet more astonishing, to see that a people can be so wild as to allow of and acknowledge those prerogatives and exemptions, even to their own destruction? Is it so hard a matter to distinguish between the majesty of our sovereign, and the power of a governor of the plantations? Is not this making very free with our prince, to apply that regard, obedience and allegiance to a subject which is due only to our sovereign? And yet in all the cases which Mr. Attorney has cited, to shew the duty and obedience we owe to the supreme magistrate, it is the king which is there meant and understood, though Mr. Attorney is pleased to urge them as authorities to prove the lawfulness of Mr. Zenger's offence against the governor of New-York. The several plantations are compared to so many large corporations, and perhaps not improperly; and can any one give an instance, that the mayor, or head of a corporation, ever put in a claim to the sacred rights of majesty? Let us not (while we are pretending to pay a great regard to our prince and his peace) make bold to transfer that allegiance to a subject, which we owe to our king only. What strange doctrine is it, to press every thing for law here which is so in England! I believe we should not think it a favour, at present at least, to establish this practice. In England so great a regard and reverence is had to the judges*, that, if any man strikes another in Westminster-Hall, while the judges are sitting, he shall lose his right-hand, and forfeit his land and goods, for so doing. And tho' the judges here claim all the powers and authorities within this government, that a court of King's-bench has in England; yet I believe Mr. Attorney will scarcely say, that such a punishment could be legally inflicted on a man for com-

* C. 3 Inst. 140.

mitting such an offence, in the presence of the judges sitting in any court within the province of New-York. The reason is obvious; a quarrel or riot in New-York cannot possibly be attended with those dangerous consequences that it might in Westminster-hall; nor (I hope) will it be alledged, that any misbehaviour to a governor in the plantations will, or ever ought to be, judged of or punished, as a like undutifulness would be to our sovereign. From all which, I hope Mr. Attorney will not think it proper to apply his law-cases (to support the cause of his governor) which have only been judged where the king's safety or honour was concerned. It will not be denied, but that a freeholder in the province of New-York has as good a right to the sole and separate use of his lands, as a freeholder in England, who has a right to bring an action of trespass against his neighbour, for suffering his horse or cow to come and feed upon his lands or eat his corn, whether inclosed or not inclosed; and yet I believe it would be looked upon as a strange attempt, for one man here to bring an action against another, whose cattle and horses feed upon his grounds not inclosed, or indeed for eating and treading down his corn, if that were not inclosed. Numberless are the instances of this kind that might be given, to shew, that what is good law at one time and in one place, is not so at another time and in another place; so that I think, the law seems to expect, that in these parts of the world men should take care, by a good fence, to preserve their property from the injury of unruly beasts: and perhaps there may be as good reason why men should take the same care, to make an honest and upright conduct a fence and security against the injury of unruly tongues.

Mr. Attorney. I don't know what the gentleman means, by comparing cases of freeholders in England with the freeholders here. What has this case to do with actions of trespass, or men's fencing their grounds? The case before the court is, whether Mr. Zenger is guilty of libelling his excellency the governor of New-York, and indeed the whole administration of the government? Mr. Hamilton has confessed the printing and publishing; and I think nothing is plainer, than that the words in the information are scandalous, and tend to sedition, and to disquiet the minds of the people of this province: and if such papers are not libels, I think it may be said, there can be no such thing as a libel.

Mr. Hamilton. May it please your honour, I cannot agree with Mr. Attorney: for though I freely acknowledge, that there are such things as libels, yet I must insist at the same time, that what my client is charged with is not a libel: and I ob-

served just now, that Mr. Attorney, in defining a libel, made use of the words, scandalous, seditious, and tend to disquiet the people; but (whether with design or not I will not say) he omitted the word false.

Mr. Attorney. I think I did not omit the word false: but it has been said already, that it may be a libel, notwithstanding it may be true.

Mr. Hamilton. In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the court and jury, and to which we have pleaded not guilty; and by it we are charged with printing and publishing a certain false, malicious, seditious and scandalous libel. This word False must have some meaning, or else how came it there? I hope Mr. Attorney will not say, he put it there by chance, and I am of opinion his information would not be good without it. But to shew that it is the principal thing which, in my opinion, makes a libel, I put the case, the information had been for printing and publishing a certain true libel, would that be the same thing? or could Mr. Attorney support such an information by any precedent in the English law? No; the falshood makes the scandal, and both make the libel. And to shew the court that I am in good earnest, and to save the court's time, and Mr. Attorney's trouble, I will agree, that if he can prove the facts charged upon us, to be false, I'll own them to be scandalous, seditious, and a libel. So the work seems now to be pretty much shortened, and Mr. Attorney has now only to prove the words false, in order to make us guilty.

Mr. Attorney. We have nothing to prove; you have confessed the printing and publishing; but if it was necessary (as I insist it is not) how can we prove a negative? But I hope some regard will be had to the authorities that have been produced; and that supposing all the words to be true, yet that will not help them. Chief-justice Holt, in his charge to the jury, in the case of Tutchin, made no distinction, whether Tutchin's papers were true or false; and as chief-justice Holt has made no distinction in that case, so none ought to be made here; nor can it be shewn in all that case, there was any question made about their being false or true.

Mr. Hamilton. I did expect to hear that a negative cannot be proved; but every body knows there are many exceptions to that general rule: for if a man is charged with killing another, or stealing his neighbour's horse; if he is innocent in the one case, he may prove the man, said to be killed, to be really alive; and the horse, said to be stolen, never to have been out of his master's stable, &c. and this I think is proving a negative.

But

But we will save Mr. Attorney the trouble of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be true.

Mr. Ch. Justice. You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence; a libel is not to be justified; for it is nevertheless a libel that it is true.

Mr. Hamilton. I am sorry the court has so soon resolved on that piece of law; I expected first to have been heard to that point. I have not, in all my reading, met with an authority that says, we cannot be admitted to give the truth in evidence, upon an information for a libel.

Mr. Ch. Justice. The law is clear, That you cannot justify a libel.

Mr. Hamilton. I own that, may it please your honour, to be so; but, with submission, I understand the word (Justify) there, to be a justification by plea, as it is in the case upon an indictment for murder, or an assault and battery; there the prisoner cannot justify, but plead not guilty: yet it will not be denied but he may be, and always is, admitted to give the truth of the fact, or any other matter, in evidence, which goes to his acquittal; as in murder he may prove it was in defence of his life, his house, &c. and in assault and battery, he may give in evidence that the other party struck first, and in both cases he will be acquitted. And in this sense I understand the word Justify, when applied to the case before the court.

Mr. Ch. Justice. I pray shew that you can give the truth of a libel in evidence.

Mr. Hamilton. I am ready, both from what I understand to be the authorities in the case, and from the reason of the thing, to shew that we may lawfully do so. But here I beg leave to observe, That informations for libels is a child, if not born, yet nursed and brought up to full maturity, in the court of Star-chamber.

Mr. Ch. Justice. Mr. Hamilton you'll find yourself mistaken; for in Coke's Institutes you'll find informations for libels, long before the court of Star-chamber.

Mr. Hamilton. I thank your honour; that is an authority I did propose to speak to by-and-by: but as you have mentioned it, I'll read that authority now. I think it is in 3 Co. Inst. under title Libel; it is the case of John de Northampton, for a letter wrote to Robert de Ferrers, one of the king's privy-council†, concerning Sir William Scot, chief-justice, and his fellows; but it does not appear to have been upon information: and I have good grounds to say it was upon

† Coke, 3 Inst. 174.

indictment, as was the case of Adam de Ravensworth, just mentioned before by lord Coke under the same title; and I think there cannot be a greater, at least a plainer, authority for us, than the judgment in the case of John de Northampton, which my lord has set down at large. *Et quia prædictus Johannes cognovit dictum literam per se scriptam Roberto de Ferrers, qui est de concilio regis, qua litera continet in se nullam veritatem, &c.* Now, Sir, by this judgment it appears the libellous words were utterly false, and there the falshood was the crime, and is the ground of that judgment: and is not that what we contend for? Do not we insist, that the falshood makes the scandal, and both make the libel? And how shall it be known, whether the words are libellous; that is, true or false, but by admitting us to prove them true, since Mr. Attorney will not undertake to prove them false? Besides, is it not against common sense, that a man should be punished in the same degree for a true libel (if any such thing could be) as for a false one? I know it is said, "That truth makes a libel the more provoking, and therefore the offence is the greater, and consequently the judgment should be the heavier." Well, suppose it were so, and let us agree for once, That "truth is a greater sin than falshood;" yet, as the offences are not equal, and as the punishment is arbitrary, that is, according as the judges in their discretion shall direct to be inflicted; is it not absolutely necessary that they should know, whether the libel is true or false, that they may by that means be able to proportion the punishment? For, would it not be a sad case, if the judges, for want of a due information, should chance to give as severe a judgment against a man for writing or publishing a lie, as for writing or publishing a truth? And yet this (with submission) as monstrous and ridiculous as it may seem to be, is the natural consequence of Mr. Attorney's doctrine, That "truth makes a worse libel than falshood," and must follow from his not proving our papers to be false, or not suffering us to prove them to be true. But this is only reasoning upon the case; and I will now proceed to shew, what, in my opinion, will be sufficient to induce the court, to allow us to prove the truth of the words, which in the information are called libellous. And first, I think there cannot be a greater authority for us, than the judgment I just now mentioned, in the case of John de Northampton; and that was in early times, and before the Star-chamber came to its fulness of power and wickedness. In that judgment, as I observed, the falshood of the letter which was wrote, is assigned as the very ground of the sentence; and agreeable to this it was urged

urged by Sir Robert Sawyer*, in the Trial of the Seven Bishops, That the falsity, the malice, and sedition of the writing, were all facts to be proved. But here it may be said, Sir Robert was one of the bishop's council, and his argument is not to be allowed for law : but I offer it only to shew, that we are not the first who have insisted, that to make a writing a libel it must be false. And if the argument of a council must have no weight, I hope there will be more regard shewn to the opinion of a judge ; and therefore I mention the words of justice Powel in the same trial, where he says (of the petition of the bishops, which was called a libel, and upon which they were prosecuted by information) That, " To make it a libel, it must be false and malicious, and tend to sedition ;" and declared, " As he saw no falshood or malice in it, he was of opinion, that it was no libel." Now I should think this opinion alone, in the case of the king, and in a case which the king had so much at heart, and which to this day has never been contradicted, might be a sufficient authority, to entitle us to the liberty of proving the truth of the papers, which in the information are called false, malicious, seditious and scandalous. If it be objected, That the opinions of the other three judges were against him ; I answer, That the censures the judgments of these men have undergone, and the approbation justice Powel's opinion, his judgment and conduct upon that trial has met with, and the honour he gained to himself, for daring to speak truth at such a time, upon such an occasion, and in the reign of such a king, are more than sufficient, in my humble opinion, to warrant our insisting on his judgment, as a full authority to our purpose ; and it will lie upon Mr. Attorney to shew, that this opinion has, since that time, been denied to be law ; or that justice Powel, who delivered it, has ever been condemned or blamed for it in any law-book extant at this day ; and this I will venture to say Mr. Attorney cannot do. But to make this point yet more clear, if any thing can be clearer, I will on our part proceed and shew, that in the case of Sir Samuel Barnadiston, his council, notwithstanding he stood before one of the greatest monsters that ever presided in an English court (judge Jefferies) insisted on the want of proof to the malice and seditious intent of the author of what was called a libel. And in the case of Tutchin, which seems to be Mr. Attorney's chief authority, that case is against him ; for he was upon his trial put upon shewing the truth of his papers, but did not, at least the prisoner was asked, by the king's council,

† State Trials, vol. iv.

† whether

† whether he would say they were true? And as he never pretended, that they were true, the chief-justice was not to say so. But the point will still be clearer on our side from Fuller's case, for falsely and wickedly causing to be printed a false and scandalous libel, in which (amongst other things) were contained these words: "Mr. Jones has also made oath, That he paid 5000 l. more by the late king's order, to several persons in places of trust, that they might complete my ruin, and invalidate me for ever. Nor is this all; for the said Mr. Jones will prove, by undeniable witness and demonstration, that he has distributed more than 180,000 l. in eight years last past, by the French king's order, to persons in public trust in this kingdom." Here you see is a scandalous and infamous charge against the late king; here is a charge, no less than high-treason, against the men in public trust, for receiving money of the French king, then in actual war with the crown of Great-Britain; and yet the court were far from bearing him down with Star-chamber doctrine; to wit, That it was no matter, whether what he said was true or false: no; on the contrary, lord-chief-justice Holt asks Fuller, "Can you make it appear they are true? Have you any witnesses? You might have had subpoenas for your witnesses against this day. If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. If you have any witnesses, I will hear them. How came you to write those books which are not true? If you have any witnesses, produce them. If you can offer any matter to prove what you have wrote, let us hear it." Thus said, and thus did, that great man lord chief-justice Holt, upon a trial of the like kind with ours; and the rule laid down by him in this case is, "That he who will take upon him to write things, it lies upon him to prove them at his peril." Now, Sir, we have acknowledged the printing and publishing of those papers, set forth in the information, and (with the leave of the court) agreeable to the rule laid down by chief-justice Holt, we are ready to prove them to be true, at our peril.

Mr. Ch. Justice. Let us see the book.

[Here the court had the case under consideration a considerable time, and every one was silent.]

Mr. Ch. Justice. Mr. Attorney, you have heard what Mr. Hamilton has said, and the cases he has cited, for having his witnesses examined, to prove the truth of the several facts con-

tained in the papers set forth in the information. What do you say to it?

Mr. Attorney. The law, in my opinion, is very clear; they cannot be admitted to justify a libel; for, by the authorities I have already read to the court, it is not the less a libel because it is true. I think I need not trouble the court with reading the cases over again: the thing seems to be very plain, and I submit it to the court.

Mr. Ch. Justice. Mr. Hamilton, the court is of opinion, you ought not to be permitted to prove the facts in the papers: these are the words of the book, "It is far from being a justification of a libel, that the contents thereof is true, or that the person upon whom it is made had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is."

Mr. Hamilton. These are Star-chamber cases, and I was in hopes, that practice had been dead with the court.

Mr. Ch. Justice. Mr. Hamilton, the court have delivered their opinion, and we expect you will use us with good manners; you are not to be permitted to argue against the opinion of the court.

Mr. Hamilton. With submission, I have seen the practice in very great courts, and never heard it deemed unmannerly to

Mr. Ch. Justice. After the court have declared their opinion, it is not good manners to insist upon a point, in which you are over-ruled.

Mr. Hamilton. I will say no more at this time; the court I see is against us in this point; and that I hope I may be allowed to say.

Mr. Ch. Justice. Use the court with good manners, and you shall be allowed all the liberty you can reasonably desire.

Mr. Hamilton. I thank your honour. Then, gentlemen of the jury, it is to you we must now appeal; for witnesses to the truth of the facts we have offered, and are denied the liberty to prove; and let it not seem strange, that I apply myself to you in this manner; I am warranted so to do both by law and reason. The law supposes you to be summoned, out of the neighbourhood where the fact is alledged to be committed; and the reason of your being taken out of the neighbourhood is, because you are supposed to have the best knowledge of the fact that is to be tried. And were you to find a verdict against my client, you must take upon you to say, the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous, and seditious; but of this I can
have

have no apprehension. You are citizens of New-York; you are really what the law supposes you to be, honest and lawful men; and, according to my brief, the facts which we offer to prove were not committed in a corner; they are notoriously known to be true; and therefore in your justice lies our safety. And as we are denied the liberty of giving evidence, to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, That the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you. But since we are not admitted to examine our witnesses, I will endeavour to shorten the dispute with Mr. Attorney, and to that end, I desire he would favour us with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not.

Mr. Attorney. The books, I think, have given a very full definition of a libel; they say † it is, In a strict sense, taken for a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule. §. 2. But it is said, That in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures; as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner. §. 3. And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of public peace, by provoking the parties injured, their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal? §. 4. And from the same ground it seemeth also clearly to follow, That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner reckoning up several acts of public charity done by one, says, You will not play the Jew, nor the hypocrite, and so goes on in a strain of ridicule to insinuate, that what he did was owing to his

† 1 Hawk. chap. 73. §. 1. & seq.

vain-glory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge him with the want of, as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.

Mr. Hamilton. Ay, Mr. Attorney; but what certain standard-rule have the books laid down, by which we can certainly know, whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to the breach of the peace; and are a sufficient ground to provoke a man, his family, or friends, to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard, when I say, such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

Mr. Attorney. I think the books are very full; it is said, in Hawk. p. 193, just now read, "That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner says, reckoning up several acts of charity done by one, says, You will not play the Jew or the hypocrite; and so goes on to insinuate, that what he did was owing to his vain-glory, &c. Which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so." I think nothing can be plainer or more full than these words.

Mr. Hamilton. I agree the words are very plain, and I shall not scruple to allow (when we are agreed that the words are false and scandalous, and were spoken in an ironical and scoffing manner, &c.) that they are really libellous; but here still occurs the uncertainty, which makes the difficulty to know, what words are scandalous, and what not; for you say, they may be scandalous, true or false: besides, how shall we know whether the words were spoke in a scoffing and ironical manner, or seriously? Or how can you know, whether the man did not think as he wrote? For, by your rule, if he did, it is no irony, and consequently no libel. But, under favour, Mr. Attorney, I think the same book, and the same section, will

shew us the only rule by which all these things are to be known. The words are these ; " Which kind of writing is as well *understood* to mean only to upbraid the parties with the want of these qualities, as if they had directly and expressly done so." Here it is plain, the words are scandalous, scoffing, and ironical, only as they are *understood* : I know no rule laid down in the books but this ; I mean, as the words are *understood*.

Mr. Ch. Justice. Mr. Hamilton, do you think it so hard to know when words are ironical, or spoke in a scoffing manner.

Mr. Hamilton. I own it may be known ; but I insist, the only rule to know is, as I do or can understand them ; I have no other rule to go by, but as I understand them.

Mr. Ch. Justice. That is certain. All words are libellous or not, as they are understood. Those who are to judge of the words, must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious : there can be no doubt of it.

Mr. Hamilton. I thank your honour ; I am glad to find the court of this opinion. Then it follows that those twelve men must understand the words in the information to be scandalous, that is to say, false ; for I think it is not pretended they are of the ironical sort ; and when they understand the words to be so, they will say we are guilty of publishing a false libel, and not otherwise.

Mr. Ch. Justice. No, Mr. Hamilton ; the jury may find that Zenger printed and published those papers, and leave it to the court to judge whether they are libellous ; you know this is very common ; it is in the nature of a special verdict, where the jury leave the matter of law to the court.

Mr. Hamilton. I know, may it please your honour, the jury may do so ; but I do likewise know, they may do otherwise. I know they have a right beyond all dispute, to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This of leaving it to the judgment of the court, whether the words are libellous or not, in effect renders juries useless (to say no worse) in many cases ; but this I shall have occasion to speak to by-and-by ; and I will, with the court's leave, proceed to examine the inconveniences that must inevitably arise from the doctrines Mr. Attorney has laid down ; and I observe, in support of this prosecution, he has frequently repeated the words taken from the case of Libel, Famosus, in 5 Co. This is indeed the leading case, and to which almost all the other cases upon the subject of libels

do refer ; and I must insist upon saying, That according as this case seems to be understood by the court and Mr. Attorney, it is not law at this day : for though I own it to be base and unworthy to scandalize any man, nay I think it is even villainous to scandalize a person of public character, and I will go so far into Mr. Attorney's doctrine, as to agree, that if the faults, mistakes, nay even the vices of such a person be private and personal, and do not affect the peace of the public, or the liberty or property of our neighbour, it is unmanly and unmannerly to expose them either by word or writing. But when a ruler of a people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that will alter the case mightily, and all the high things that are said in favour of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when they feel themselves oppressed, I mean in a free government. It is true in times past it was a crime to speak truth, and in that terrible court of star-chamber, many worthy and brave men suffered for so doing ; and yet even in that court, and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, to wit, " The practice of informations for libels, is a sword in the hands of a wicked king, and an arrand coward, to cut down and destroy the innocent ; the one cannot, because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner."

Mr. Attorney. Pray, Mr. Hamilton, have a care what you say, do not go too far neither ; I do not like those liberties.

Mr. Hamilton. Sure, Mr. Attorney, you won't make any applications ; all men agree, that we are governed by the best of kings, and I cannot see the meaning of Mr. Attorney's caution : my well-known principles, and the sense I have of the blessings we enjoy under his present majesty, makes it impossible for me to err, and I hope, even to be suspected, in that point of duty to my king. May it please your honour, I was saying, That notwithstanding all the duty and reverence claimed by Mr. Attorney to men in authority, they are not exempt from observing the rules of common justice, either in their private or public capacities ; the laws of our mother-country know no exemption. It is true, men in power are harder to be come at for wrongs they do, either to a private person or to the public ; especially a governor in the plantations, where they insist upon an exemption from answering

complaints of any kind in their own government. We are indeed told, and it is true they are obliged to answer a suit in the king's courts at Westminster, for a wrong done to any person here; but do we not know how impracticable this is to most men among us, to leave their families (who depend upon their labour and care for their livelihood) and carry evidences to Britain, and at a great, nay a far greater expence than almost any of us are able to bear, only to prosecute a governor for an injury done here. But when the oppression is general, there is no remedy even that way: however, our constitution has (blessed be God) given us an opportunity, if not to have such wrongs redressed, yet by our prudence and resolution we may in a great measure prevent the committing of such wrongs, by making a governor sensible that it is his interest to be just to those under his care; for such is the sense that men in general (I mean freemen) have of common justice, that when they come to know, that a chief magistrate abuses the power with which he is trusted, for the good of the people, and is attempting to turn that very power against the innocent, whether of high or low degree; I say, mankind in general seldom fail to interpose, and, as far as they can, prevent the destruction of their fellow-subjects. And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are, by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is bound, to protect and encourage. But I pray it may be considered of what use is this mighty privilege, if every man that suffers must be silent? And if a man must be taken up as a libeller for telling his sufferings to his neighbour? I know it may be answered, Have you not a legislature? Have you not a house of representatives to whom you may complain? And to this I answer, we have. But what then? Is an assembly to be troubled with every injury done by a governor? Or are they to hear of nothing but what those in the administration will please to tell them? Or what sort of a trial must a man have? And how is it to be remedied; especially if the case were, as I have known it to happen in America in my time, That a governor who has places (I will not say pensions, for I believe they seldom give that to another which they can take to themselves) to bestow, and can or will keep the same assembly (after he has

has modelled them so as to get a majority of the house in his interest) for near twice seven years together? I pray, what redress is to be expected for an honest man, who makes his complaint against a governor, to an assembly who may properly enough be said, to be made by the same governor against whom the complaint is made? The thing answers itself. No, it is natural, it is a privilege; I will go farther, it is a right which all freemen claim, and are intitled to complain when they are hurt; they have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbours upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it, as one of the greatest blessings Heaven can bestow. And when a house of assembly composed of honest freemen sees the general bent of the people's inclinations, That is it which must and will (I am sure it ought to) weigh with a legislature, in spite of all the craft, caressing and cajoling, made use of by a governor, to divert them from hearkening to the voice of their country. As we all very well understand the true reason, why gentlemen take so much pains and make such great interest to be appointed governors, so is the design of their appointment not less manifest. We know his majesty's gracious intentions to his subjects; he desires no more than that his people in the plantations should be kept up to their duty and allegiance to the crown of Great-Britain, that peace may be preserved amongst them, and justice impartially administered; that we may be governed so as to render us useful to our mother-country, by encouraging us to make and raise such commodities as may be useful to Great-Britain. But will any one say, that all or any of these good ends are to be effected by a governor's setting his people together by the ears, and by the assistance of one part of the people to plague and plunder the other? The commission which governors bear, while they execute the powers given them, according to the intent of the royal granter, expressed in their commissions, requires and deserves very great reverence and submission: but when a governor departs from the duty enjoined him by his sovereign, and acts as if he was less accountable than the royal hand that gave him all that power and honour which he is possessed of; this sets people upon examining and enquiring into the power, authority, and duty, of such a magistrate, and to compare those with his conduct; and just as far as they find he exceeds the bounds of his authority, or falls short of doing impartial justice to the people under

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his administration, so far they very often, in return, come short in their duty to such a governor. Power alone will not make a man beloved; and I have heard it observed, That the man who was neither good nor wise before his being made a governor, never mended upon his preferment; but has been generally observed to be worse: for men who are not endued with wisdom and virtue, can only be kept in bounds by the law; and by how much the further they think themselves out of the reach of the law, by so much the more wicked and cruel men are. I wish there were no instances of the kind at this day. And wherever this happens to be the case of a governor, unhappy are the people under his administration, and in the end he will find himself so too; for the people will neither love him nor support him. I make no doubt but there are those here, who are zealously concerned for the success of this prosecution; and yet I hope they are not many, and even some of those, I am persuaded, (when they consider what lengths such prosecutions may be carried, and how deeply the liberties of the people may be affected by such means) will not all abide by their present sentiments; I say, not all: for a man who from an intimacy and acquaintance with a governor, has conceived a personal regard for him; the man who has felt none of the strokes of his power, the man who believes that a governor has a regard for him and confides in him, it is natural for such men to wish well to the affairs of such a governor; and as they may be men of honour and generosity, may, and no doubt will, wish him success, so far as the rights and privileges of their fellow citizens are not affected. But as men of honour, I can apprehend nothing from them; they will never exceed that point. There are others that are under stronger obligations, and those are such as are in some sort engaged in support of a governor's cause, by their own or their relations' dependence on his favour, for some post or preferment; such men have what is commonly called duty and gratitude, to influence their inclinations, and oblige them to go his lengths. I know mens' interests are very near to them, and they will do much rather than forego the favour of a governor, and a livelihood at the same time; but I can with very just grounds hope, even from these men, whom I will suppose to be men of honour and conscience too, that when they see the liberty of their country in danger, either by their concurrence, or even by their silence, they will, like Englishmen, and like themselves, freely make a sacrifice of any preferment or favour rather than be accessory to destroying the liberties of their country, and entailing slavery upon their posterity. There are

are indeed another set of men, of whom I have no hopes, I mean such, who lay aside all other considerations, and are ready to join with power in any shape, and with any man or sort of men, by whose means or interest they may be assisted to gratify their malice and envy against those whom they have been pleased to hate; and that for no other reason, but because they are men of abilities and integrity, or at least are possessed of some valuable qualities far superior to their own. But as envy is the sin of the devil, and therefore very hard, if at all, to be repented of, I will believe there are but few of this detestable and worthless sort of men, nor will their opinions or inclinations have any influence upon this trial. But to proceed; I beg leave to insist, that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and that those restraints can only extend to what is false: for as it is truth alone which can excuse or justify any man for complaining of a bad administration, I as frankly agree, that nothing ought to excuse a man who raises a false charge or accusation even against a private person, and that no manner of allowance ought to be made him who does so against a public magistrate. Truth ought to govern the whole affair of libels, and yet the party accused runs risque enough even then; for if he fails of proving every tittle of what he has wrote, and to the satisfaction of the court and jury too, he may find to his cost, that, when the prosecution is set on foot by men in power, it seldom wants friends to favour it. And from thence (it is said) has arisen the great diversity of opinions among judges, about what words were or were not scandalous or libellous. I believe it will be granted, that there is not greater uncertainty in any part of the law, than about words of scandal; it would be mispending of the court's time to mention the cases; they may be said to be numberless; and therefore the utmost care ought to be taken in following precedents; and the times when the judgments were given, which are quoted for authorities in the case of libels are much to be regarded. I think it will be agreed, That ever since the time of the star-chamber, where the most arbitrary and destructive judgments and opinions were given, that ever an Englishman heard of, at least in his own country; I say, prosecutions for libels since the time of that arbitrary court, and until the glorious revolution, have generally been set on foot at the instance of the crown or its ministers; and it is no small reproach to the law, that these prosecutions were too often and too much countenanced by the judges, who held their places at pleasure, (a disagreeable tenure to any officer,

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but a dangerous one in the case of a judge.) To say more to this point may not be proper. And yet I cannot think it unwarrantable, to shew the unhappy influence that a sovereign has sometimes had, not only upon judges, but even upon parliaments themselves.

It has already been shewn, how the judges differed in their opinions about the nature of a libel, in the case of the seven bishops. There you see three judges of one opinion, that is, of a wrong opinion, in the judgment of the best men in England, and one judge of a right opinion. How unhappy might it have been for all of us at this day, if that jury had understood the words in that information as the court did? Or if they had left it to the court, to judge whether the petition of the bishops was or was not a libel? No! they took upon them, to their immortal honour, to determine both law and fact, and to understand the petition of the bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them not guilty. And remarkable is the case of Sir Samuel Barnardiston, who was fined 10,000*l.* for writing a letter, in which, it may be said, none saw any scandal or falsehood but the court and jury; for that judgment was afterwards looked upon as a cruel and detestable judgment, and therefore was reversed by parliament. Many more instances might be given of the complaisance of court judges, about those times and before; but I will mention only one case more, and that is the case of Sir Edward Hales, who, though a Roman Catholic, was by king James II. preferred to be a colonel of his army, notwithstanding the statute of 25 Cha. 2*d.* Chap. 2. by which it is provided, "That every one that accepts of an office, civil or military, &c. shall take the oaths, subscribe the declaration, and take the sacrament, within three months, &c. otherwise he is disabled to hold such office, and the grant for the same to be null and void, and the party to forfeit 500*l.*" Sir Edward Hales did not take the oaths or sacrament, and was prosecuted for the 500*l.* for exercising the office of a colonel by the space of three months, without conforming as in the act is directed. Sir Edward pleads, "That the king by his letters-patents did dispense with his taking the oaths and sacrament, and subscribing the declaration, and had pardoned the forfeiture of 500*l.*" And "whether the king's dispensation was good, against the said act of parliament?" was the question. I shall mention no more of this case, than to shew how in the reign of an arbitrary prince, where judges hold their seats at pleasure; their determinations have not always been such as to make precedents of, but the contrary;

contrary, and so it happened in this case where it was solemnly judged, "That, notwithstanding this act of parliament, made in the strongest terms for preservation of the protestant religion, That yet the king had, by his royal prerogative, a power to dispense with that law;" and sir Edward Hales was acquitted by the judges accordingly. So the king's dispensing power, being by the judges set up above the act of parliament, this law, which the people looked upon as their chief security against popery and arbitrary power, was by this judgment rendered altogether ineffectual. But this judgment is sufficiently exposed by sir Edward Atkins *, late one of the judges of the court of Common-pleas in his Enquiry into the king's power of dispensing with poenal statutes; where it is shewn, who it was that first invented dispensations; how they came into England; what ill use has been made of them there; and all this principally owing to the countenance given them by the judges. He says of the dispensing power †, The pope was the inventor of it; our kings have borrowed it from them; and the judges have from time to time nursed and dressed it up, and given it countenance; and it is still upon the growth, and encroaching, 'till it has almost subverted all law, and made the regal power absolute if not dissolute. This seems not only to shew how far judges have been influenced by power, and how little cases of this sort, where the prerogative has been in question in former reigns, are to be relied upon for law: but I think it plainly shews too, that a man may use a greater freedom with the power of his sovereign and the judges in Great-Britain, than it seems he may with the power of a governor in the plantations, who is but a fellow-subject. Are these words with which we are charged, like these? Do Mr. Zenger's papers contain any such freedoms with his governor or his council, as sir Edward Atkins has taken with the regal power and the judges in England? And yet I never heard of any information brought against him for these freedoms.

If then upon the whole there is so great an uncertainty among judges (learned and great men) in matters of this kind; if power has had so great an influence on judges; how cautious ought we to be in determining by their judgments, especially in the plantations, and in the case of libels? There is heresy in law, as well as in religion, and both have changed very much; and we well know, that it is not two centuries

* Sir Edward Atkins's enquiry into the power of dispensing with poenal statutes.

† Postscript to the Enquiry, pag. 51.

ago that a man would have been burnt as an heretic, for owning such opinions in matters of religion as are publicly wrote and printed at this day. They were fallible men, it seems, and we take the liberty not only to differ from them in religious opinions, but to condemn them and their opinions too; and I must presume, that in taking these freedoms in thinking and speaking about matters of faith or religion, we are in the right: for, tho' it is said there are very great liberties of this kind taken in New-York, yet I have heard of no information preferred by Mr. Attorney for any offences of this sort. From which I think it is pretty clear, That in New-York a man may make very free with his God, but he must take special care what he says of his governor. It is agreed upon by all men that this is a reign of liberty, and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power, I mean of that part of their conduct only, which affects the liberty or property of the people under their administration. Were this to be denied, then the next step may make them slaves: for what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing.

It is said and insisted on by Mr. Attorney, "That government is a sacred thing; That it is to be supported and revered; it is government that protects our persons and estates; That prevents treasons, murders, robberies, riots, and all the train of evils that overturns kingdoms and states, and ruins particular persons; and if those in the administration, especially the supreme magistrate, must have all their conduct censured by private men, government cannot subsist." This is called a licentiousness not to be tolerated. It is said, "That it brings the rulers of the people into contempt, and their authority not to be regarded, and so in the end the laws cannot be put in execution." These I say, and such as these, are the general topics insisted upon by men in power, and their advocates. But I wish it might be considered at the same time, how often it has happened, that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men, which has commonly brought them into contempt with the people. The craft and art of such men is great, and who, that is the least acquainted with history or law, can be ignorant of the specious pretences, which have often been made use of by men in power, to introduce arbitrary rule, and destroy the liberties of a free people.

ple. I will give two instances; and as they are authorities not to be denied, nor can be misunderstood, I presume they will be sufficient.

The first is the statute of 3d of Hen. 7. Cap. 1. The preamble of the statute will prove all, and more than I have alleged. It begins, "The king our sovereign lord remembereth how by unlawful maintenances, giving of liveries, signs and tokens, &c. untrue demeanings of sheriffs in making of pannels; and other untrue returns, by taking of money, by injuries, by great riots and unlawful assemblies; the policy and good rule of this realm is almost subdued; and for the not punishing these inconveniencies, and by occasion of the premisses; little or nothing may be found by inquiry, &c. to the increase of murders, &c. and unfurtries of all men living, and losses of their lands and goods." Here is a fine and specious pretence for introducing the remedy, as it is called, which is provided by this act, that is; instead of being lawfully accused by 24 good and lawful men of the neighbourhood, and afterwards tried by 12 like lawful men, here is a power given to the lord chancellor, lord treasurer, the keeper of the king's privy-seal, or two of them, calling to them a bishop, a temporal lord, and other great men mentioned in the act, (who, it is to be observed, were all to be dependents on the court) to receive information against any person for any of the misbehaviours recited in that act, and at their discretion to examine and to punish them according to their demerit.

The second statute I proposed to mention, is the 11th of the same king, Cap. 3. the preamble of which act has the like fair pretences as the former; "for the king calling to his remembrance the good laws made against the receiving of liveries, &c. unlawful extortions, maintenances, embracery, &c. unlawful games, &c. and many other great enormities, and offences committed against many good statutes, to the displeasure of almighty God," which, the act says, "could not, nor yet can, be conveniently punished by the due order of the law, except it were first found by 12 men, &c. which, for the causes aforesaid, will not find nor yet present the truth." And therefore the same statute directs, "That the justices of assize, and justices of the peace, shall upon information for the king before them made, have full power, by their discretion, to hear and determine all such offences." Here are two statutes that are allowed to have given the deepest wound to the liberties of the people of England of any that I remember to have been made; unless it may be said, that the

statute made in the time of Henry VIIIth, by which his proclamations were to have the effect of laws, might in its consequence be worse. And yet we see the plausible pretences found out by the great men to procure these acts. And it may justly be said, That by those pretences the people of England were cheated or awed into the delivering up their antient and sacred right of trials by grand and petit juries. I hope to be excused for this expression, seeing my Lord Coke (in his 4th institute) calls it "an unjust and strange act, that tended in its execution to the great displeasure of almighty God, and the utter subversion of the common law."

These, I think, make out what I alleged, and are flagrant instances of the influence of men in power, even upon the representatives of a whole kingdom. From all which I hope it will be agreed, that it is a duty which all good men owe to their country, to guard against the unhappy influence of ill men when intrusted with power, and especially against their creatures and dependants, who, as they are generally more necessitous, are surely more covetous and cruel. But it is worthy of observation, that tho' the spirit of liberty was borne down and oppressed in England at that time, yet it was not lost; for the parliament laid hold of the first opportunity to free the subject from the many insufferable oppressions and outrages committed upon their persons and estates by colour of these acts, the last of which being deemed the most grievous, was repealed in the first year of Henry VIIIth. Tho' it is to be observed, that Henry VIIIth and his creatures reaped such great advantages by the grievous oppressions and exactions, grinding the faces of the poor subjects, as my lord Coke says, by colour of this statute by information only, that a repeal of this act could never be obtained during the life of that prince. The other statute, being the favourite law for supporting arbitrary power, was continued much longer. The execution of it was by the great men of the realm; and how they executed it, the sense of the kingdom, expressed in the 17th of Charles Ist, (by which the court of star-chamber, the soil where informations grew rankest) will best declare. In that statute Magna Charta, and the other statutes made in the time of Edward III. which, I think, are no less than five, are particularly enumerated as acts, by which the liberties and privileges of the people of England were secured to them, against such oppressive courts as the star-chamber and others of the like jurisdiction. And the reason assigned for their pulling down the star-chamber, is, "That the proceedings, censures and decrees of the court of star chamber, even tho' the great men

men of the realm, nay, and a bishop too (holy man) were judges, had by experience been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power and government." And therefore, that court was taken away, with all the other courts in that statute mentioned, having like jurisdiction.

I do not mention this statute, as if, by the taking away the court of star-chamber, the remedy for many of the abuses or offences censured there, was likewise taken away; no, I only intend by it to shew, that the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the kingdom, without the judgment of a jury of their equals. They had felt the terrible effects of leaving it to the judgment of these great men to say what was scandalous and seditious, false or ironical. And if the parliament of England thought this power of judging was too great to be trusted with men of the first rank in the kingdom, without the aid of a jury, how sacred soever their characters might be, and therefore restored to the people their original right of trial by juries, I hope to be excused for insisting, that by the judgement of a parliament, from whence no appeal lies, the jury are the proper judges, of what is false at least, if not of what is scandalous and seditious. This is an authority not to be denied; it is as plain as it is great; and to say, that this act indeed did restore to the people trials by juries, which was not the practice of star-chamber, but that did not give the jurors any new authority, or any right to try matters of law, I say this objection will not avail; for I must insist, that where matter of law is complicated with matter of fact, the jury have a right to determine both. As for instance; upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say I cannot see, why in our case the jury have not at least as good a right to say, whether our newspapers are a libel or no libel, as another jury has to say, whether killing of a man is murder or manslaughter. The right of the jury, to find such a verdict as they in their conscience do think is agreeable to their evidence, is supported by the authority of *Bushel's case*, *Vaughan's reports*, p. 135. beyond any doubt. For, in the argument of that case, the chief justice, who delivered the opinion of the court, lays it down for law, (*Vaughan's reports*, p. 150.) "That in all general issues; as upon *Non Cul.* in trespass, *Non Tort.* *Nul Disseizin.* in assize, &c. tho' it is matter of law, whether the defendant:

is a trespasser, a disseizer, &c. in the particular cases in issue, yet the jury find not (as in a special verdict) the fact of every case, leaving the law to the court; but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately." It appears by the same case, that tho' the discreet and lawful assistance of the judge, by way of advice to the jury, may be useful; yet that advice or direction ought always to be upon supposition, and not positive, and upon coercion. (p. 144.) The reason given in the same book (p. 147.) is, "Because the judge (as judge) cannot know what the evidence is which the jury have, that is, he can only know the evidence given in court; but the evidence which the jury have, may be of their own knowledge, as they are returned of the neighbourhood. They may also know from their own knowledge, that what is sworn in court is not true; and they may know the witnesses to be stigmatized, to which the court may be strangers." But what speaks most to my purpose, is, that suppose the court did really know all the evidence the jury know, yet in that case it is agreed, "That the judge and jury may differ in the result of their evidence as well as two judges may," which often happens. And (p. 148.) the judge subjoins the reason, why it is no crime for a jury to differ in opinion from the court, where he says, "That a man cannot see with another's eye, nor hear by another's ear; no more can a man conclude or infer the thing by another's understanding or reasoning." From all which (I insist) it is very plain, "That the jury are by law at liberty (without any affront to the judgment of the court) to find both the law and the fact, in our case," as they did in the case I am speaking to, which I will beg leave just to mention, and it was this. Mr. Penn and Mead being Quakers, and having met in a peaceable manner, after being shut out of their meeting-house, preached in Grace-Church-Street in London, to the people of their own persuasion, and for this they were indicted; and it was said, "That they with other persons, to the number of 300, unlawfully and tumultuously assembled, to the disturbance of the peace," &c. To which they pleaded, not guilty. And the petit jury being sworn to try the issue between the king and the prisoners, that is, whether they were guilty, according to the form of the indictment; here there was no dispute but they were assembled together, to the number mentioned in the indictment; but, "whether that meeting together was riotously, tumultuously, and to the disturbance of the peace, was the question." And the court told the jury it was, and ordered the jury to find it so:

"For,"

“For,” said the court, “the meeting was the matter of fact, and that is confessed, and we tell you it is unlawful, for it is against the statute; and the meeting being unlawful, it follows of course that it was tumultuous, and to the disturbance of the peace.” But the jury did not think fit to take the court’s word for it; for they could neither find riot, tumult, or any thing tending to the breach of the peace, committed at that meeting; and they acquitted Mr. Penn and Mead. In doing of which they took upon them to judge both the law and the fact; at which the court (being themselves true courtiers) were so much offended, that they fined the jury forty marks a-piece, and committed them till paid. But Mr. Bushel, who valued the right of a jurymen and the liberty of his country more than his own, refused to pay the fine; and was resolved (though at a great expence and trouble too) to bring, and did bring, his *habeas corpus*, to be relieved from his fine and imprisonment, and he was released accordingly; and this being the judgment in his case, it is established for law, “That the judges, how great soever they be, have no right to fine, imprison, or punish a jury, for not finding a verdict according to the direction of the court.” And this I hope is sufficient to prove, That jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects. And so I have done with this point.

This is the second information for libelling of a governor that I have known in America: and the first, though it may look like a romance; yet, as it is true, I will beg leave to mention it. Governor Nicholson, who happened to be offended with one of his clergy, met him one day upon the road, and, as was usual with him (under the protection of his commission) used the parson with the worst of language, threatened to cut off his ears, slit his nose, and at last to shoot him through the head. The parson, being a reverend man, continued all this time uncovered in the heat of the sun, until he found an opportunity to fly for it; and coming to a neighbour’s house, felt himself very ill of a fever, and immediately writes for a doctor; and, that his physician might be the better judge of his distemper, he acquainted him with the usage he had received; concluding, that the governor was certainly mad, for that no man in his senses would have behaved in that manner. The doctor unhappily shews the parson’s letter; the governor came to hear of it; and so an information was preferred against the poor man, for saying he believed the governor was mad; and it was laid in the information to be false, scandalous
and

and wicked, and wrote with intent to move sedition among the people, and bring his excellency into contempt. But, by an order from the late queen Anne, there was a stop put to that prosecution, with sundry others, set on foot by the late governor, against gentlemen of the greatest worth and honour in that government.

And may not I be allowed, after all this, to say, That, by a little countenance, almost any thing which a man writes, may, with the help of that useful term of art called an innuendo, be construed to be a libel, according to Mr. Attorney's definition of it, That whether the words are spoke of a person of a public character, or of a private man, whether dead or living, good or bad, true or false, all make a libel; for, according to Mr. Attorney, after a man hears a writing read, or reads and repeats it, or laughs at it, they are all punishable. It is true, Mr. Attorney is so good as to allow, after the party knows it to be a libel; but he is not so kind as to take the man's word for it.

[Here were several cases put to shew, That though what a man writes of a governor was true, proper and necessary; yet, according to the foregoing doctrine, it might be construed to be a libel: but Mr. Hamilton, after the trial was over, being informed, That some of the cases he had put had really happened in this government, he declared he had never heard of any such; and, as he meant no personal reflections, he was sorry he had mentioned them, and therefore they are omitted here.]

Mr. Hamilton. If a libel is understood in the large and unlimited sense urged by Mr. Attorney, there is scarce a writing I know that may not be called a libel, or scarce any person safe from being called to an account as a libeller: for Moses, more as he was, libelled Cain; and who is it that has not libelled the devil? For, according to Mr. Attorney, it is no justification to say one has a bad name. Echard has libelled our good King William: Burnet has libelled, among many others, king Charles and king James; and Rapin has libelled them all. How must a man speak or write, or what must he hear, read, or sing, or when must he laugh, so as to be secure from being taken up as a libeller? I sincerely believe, that were some persons to go thro' the streets of New-York now-a-days, and read a part of the Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendoes, would easily turn it into a libel. As, for instance, N. ix. 16. "The leaders of the people cause them to err, and they that are led by them are destroyed." But should Mr. Attorney go about to make this a libel, he would read it thus:

hus : The leaders of the people [innuendo, the governor and council of New-York] cause them [innuendo, the people of his province] to err, and they [the people of this province meaning] are destroyed [innuendo, are deceived into the loss of their liberty] which is the worst kind of destruction. Or if some person should publicly repeat, in a manner not pleasing to his betters, the 10th and 11th verses of the 14th chap. of the same book, there Mr. Attorney would have a large field to display his skill, in the artful application of his innuendoes. The words are, " His watchmen are all blind, they are ignorant, &c. Yea, they are greedy dogs, that can never have enough." But to make them a libel, there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill in the right adapting his innuendoes. As, for instance, His watchmen [innuendo, the governor's council and assembly] are blind, they are ignorant [innuendo, will not see the dangerous designs of his excellency] Yea, they [the governor and council meaning] are greedy dogs, which can never have enough [innuendo, enough of riches and power.] Such an instance as this seems only fit to be laughed at; but I may appeal to Mr. Attorney himself, whether these are not at least equally proper to be applied to his excellency and his ministers, as some of the inferences and innuendoes in his information against my client. Then, if Mr. Attorney is at liberty to come into court, and file an information in the king's name, without leave, who is secure whom he is pleased to prosecute as a libeller? And as the crown-law is contended for in bad times, there is no remedy for the greatest oppression of this sort, even though the party prosecuted is acquitted with honour. And give me leave to say, as great men as any in Britain have boldly asserted, That the mode of prosecuting by information (when the grand-jury will not find *billa vera*) is a national grievance, and greatly inconsistent with that freedom which the subjects of England enjoy in most other cases. But if we are so unhappy as not to be able to ward off this stroke of power directly, yet let us take care not to be cheated out of our liberties by forms and appearances: let us always be sure, that the charge in the information is made out clearly, even beyond a doubt; for though matters in the information may be called Form upon Trial, yet they may be, and often have been found to be, Matters of Substance upon giving judgment.

Gentlemen, the danger is great, in proportion to the mischief that may happen, through our too great credulity. A proper confidence in a court is commendable: but as the verdict (whatever it is) will be yours, you ought to refer no part

of your duty to the discretion of other persons. If you should be of opinion, that there is no falshood in Mr. Zenger's papers, you will, nay (pardon me for the expression) you ought to say so; because you do not know, whether others (I mean the court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity.

The loss of liberty to a generous mind, is worse than death; and yet we know there have been those, in all ages, who, for the sake of preferment, or some imaginary honour, have freely lent a helping hand, to oppress, nay to destroy, their country. This brings to my mind that saying of the immortal Brutus, when he looked upon the creatures of Cæsar, who were very great men, but by no means good men. "You, Romans," said Brutus, "if yet I may call you so, consider what you are doing; remember you are assisting Cæsar to forge those very chains, which one day he will make yourselves wear." This is what every man (who values freedom) ought to consider: he should act by judgment, and not by affection or self-interest; for, where these prevail, no ties of either country or kindred are regarded: as, on the other hand, the man, who loves his country, prefers its liberty to all other considerations; well knowing that, without liberty, life is a misery.

A famous instance of this you will find in the history of another brave Roman of the same name: I mean Lucius Junius Brutus, whose story is well known, and therefore I shall mention no more of it, than only to shew the value he put upon the freedom of his country. This great man, assisted by a few fellow-citizens whom he had engaged in the cause, had banished Tarquin the Proud, the last king of Rome, from a throne he had ascended by inhuman murders, and possessed by the most dreadful tyranny and proscriptions: but Tarquin, by these means, had amassed incredible riches; even sufficient to bribe many of the young nobility of Rome, to assist him in recovering the crown. The plot however being discovered, the principal conspirators were apprehended, among whom were two of the sons of Junius Brutus. It was absolutely necessary that some should be made examples of, to deter others from attempting the restoring of Tarquin, and destroying the liberty of Rome. And to effect this it was, that Lucius Junius Brutus, one of the consuls of Rome, in the presence of the Roman people, sat judge and condemned his own sons, as traitors to their country: and to give the last proof of his exalted virtue and love of liberty, he, with a firmness of mind only becoming so great a man, caused their heads to be struck off in his own presence; and when

when he observed that his rigid virtue occasioned a sort of horror among the people, it is observed he only said, " My fellow citizens, do not think that this proceeds from any want of natural affection : no, the death of the sons of Brutus can affect Brutus only ; but the loss of liberty will affect my country." Thus highly was liberty esteemed in those days, that a father could sacrifice his sons to save his country. But why do I go to heathen Rome, to bring instances of the love of liberty : the best blood in Britain has been shed in the cause of liberty ; and the freedom we enjoy at this day, may be said to be, in a great measure, owing to the glorious stand the famous Hampden, and others of our countrymen, made against the arbitrary demands, and illegal impositions, of the times in which they lived ; who rather than give up the rights of Englishmen, and submit to pay an illegal tax of no more, I think, than three shillings, resolved to undergo, and for the liberty of their country did undergo, the greatest extremities, in that arbitrary and terrible court of Star-chamber, to whose arbitrary proceedings (it being composed of the principal men of the realm, and calculated to support arbitrary government) no bounds or limits could be set, nor could any other hand remove the evil but a parliament.

Power may justly be compared to a great river, which, kept within due bounds, is both beautiful and useful ; but when it overflows its banks, it is then too impetuous to be stemmed ; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.

I hope to be pardoned, Sir, for my zeal upon this occasion : it is an old and wise caution, that when our neighbour's house is on fire, we ought to take care of our own. For though, blessed be God, I live in a government where liberty is well understood, and freely enjoyed ; yet experience has shewn us all (I am sure it has to me) that a bad precedent in one government is soon set up for an authority in another ; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, whenever we apprehend it may injuriously affect ourselves or our fellow-subjects.

I am truly very unequal to such an undertaking, on many accounts. And you see I labour under the weight of many

years, and am borne down with great infirmities of body; yet old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use in assisting to quench the flame of prosecution upon informations, set on foot by the government, to deprive a people of the right of remonstrating, and complaining of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. With I could say there were no instances of this kind. But to conclude; the question before the court and you, gentlemen of the jury, is not of small or private concern; it is not the cause of a poor printer, nor of New-York alone, which you are now trying: no! it may, in its consequence, affect every freeman that lives under a British government on the main of America. It is the best cause: it is the cause of liberty! and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow-citizens; but every man who prefers freedom to a life of slavery will bless and honour you, as men who have baffled the attempt of tyranny, and who, by an impartial and uncorrupted verdict, have laid a noble foundation for securing to ourselves our posterity, and our neighbours, That, to which nature and the laws of our country have given us a right,—the liberty—both of exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth.

[Here Mr. Attorney observed, that Mr. Hamilton had gone very much out of the way, and had made himself and the people very merry: but that he had been citing cases not at all to the purpose. He said, there was no such cause as Mr. Bushel's or Sir Edward Hale's before the court; and he could not find out what the court or jury had to do with dispensations, riots, or unlawful assemblies: all that the jury had to consider of, was Mr. Zenger's printing and publishing two scandalous libels, which very highly reflected on his excellency and the principal men concerned in the administration of this government, which is confessed. That is, the printing and publishing of the journals set forth in the information is confessed. And concluded, that, as Mr. Hamilton had confessed the printing, and there could be no doubt but they were scandalous papers, highly reflecting upon his excellency, and the principal magistrates in the province; and therefore he made no doubt but the jury would find the de-

fendant

sendant guilty, and would refer to the court for their discretion.

Mr. Ch. Justice. Gentlemen of the jury : The great pains Mr. Hamilton has taken, to shew how little regard juries are to pay to the opinion of the judges ; and his insisting so much upon the conduct of some judges in trials of this kind, is done no doubt with a design that you should take very little notice of what I may say upon this occasion. I shall therefore only observe to you, that, as the facts or words in the information are confessed, the only thing that can come in question before you is, whether the words, as set forth in the information, make a libel. And that is a matter of law, no doubt, and which you may leave to the court. } But I shall trouble you no further with any thing more of my own, but read to you the words of a learned and upright judge * in a case of the like nature.

“ To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist : for it is very necessary for all governments, that the people should have a good opinion of it. And nothing can be worse to any government, than to endeavour to procure animosities : as to the management of them, this has been always looked upon as a crime ; and no government can be safe without it be punished.”

Now you are to consider, whether these words I have read to you, do not tend to beget an ill opinion of the administration of the government ? To tell us, those who are employed know nothing of the matter, and those who do know are not employed ; men are not adapted to offices, but offices to men, out of a particular regard to their interest, and not to their fitness for the places ; this is the purport of these papers.

Mr. Hamilton. I humbly beg your honour's pardon ; I am very much misapprehended, if you suppose what I said was so designed.

Sir, you know, I made an apology for the freedom I found myself under a necessity of using upon this occasion. I said, there was nothing personal designed ; it arose from the nature of our defence.

The jury withdrew, and in a small time returned, and being asked by the clerk, “ Whether they were agreed of their verdict, and whether John Peter Zenger was guilty of printing and publishing the libels in the information mentioned ? ”

* Chief Justice Holt, in Tutchin's case.

They

They answered by Thomas Hunt, their foreman, **NOT GUILTY.**

Upon which there were three huzzas in the hall, which was crowded with people; and the next day Zenger was discharged from his imprisonment*.

* On the fifteenth of September following, Mr. Hamilton was presented with the Freedom of New-York, for his admirable and spirited defence of liberty, on this occasion. A common-council was called, and there being present the mayor, recorder, aldermen, &c. they ordered, "That Andrew Hamilton, esq; of Philadelphia, barrister at law, be presented with the freedom of this corporation." Accordingly a grant of the freedom was made out, of which the following is a copy.

City of New-York. } **PAUL RICHARDS**, esq; the recorder, aldermen and assistants, of the city of New-York, convened in common-council, to all to whom these presents shall come greeting. **WHEREAS**, honour is the just reward of virtue, and public benefits demand a public acknowledgement. We therefore, under a grateful sense of the remarkable service done to the inhabitants of this city and colony, by Andrew Hamilton, esq; of Pennsylvania, barrister at law, by his learned and generous defence of the rights of mankind, and the liberty of the press, in the case of John Peter Zenger, lately tried on an information exhibited in the supreme court of this colony, do by these presents, bear to the said Andrew Hamilton, esq; the public thanks of the freemen of this corporation for that signal service, which he cheerfully undertook under great indisposition of body, and generously performed, refusing any fee or reward. And in testimony of our great esteem for his person, and sense of his merit, do hereby present him with the freedom of this corporation. These are therefore to certify and declare, that the said Andrew Hamilton, esq; is hereby admitted, received and allowed, a freeman and citizen of the said city, to have, hold, enjoy and partake of all the benefits, privileges, freedoms and immunities whatsoever, granted or belonging to a freeman and citizen of the said city. In testimony whereof, the common-council of the said city, in common-council assembled, have caused the seal of the said city to be hereunto affixed, this twenty-ninth day of September, A. D. one thousand seven hundred and thirty-five.

By order of common council,

W. SHARPAS, Cl.

Several members of the corporation, and gentlemen of the city, voluntarily contributed sufficient for a gold box of five ounces and a half, for inclosing the seal of the freedom; upon the lid of which, was engraved the arms of New-York.

And the freedom and box were carried to Philadelphia, and there gratefully accepted by Mr. Hamilton.

Round on the lid of the box was engraved, besides the arms of New-York, this motto in a garter:

DEMERSÆ LEGES---TIMEFACTA LIBERTAS---HÆC TANDEM EMUERGUNT.

On the inside of the lid, in a flying garter, this:

NON NUMMIS,---VIRTUTE PARATUR.

On the front of the rim was part of Tully's wish:

ITA CUIQUE EVENIAT, UT DE REPUBLICA MERUIT.

END OF ZENGER'S TRIAL.

NEVER BEFORE PRINTED.

THE

TRIAL

OF

MR. WILLIAM OWEN,

Bookseller, near Temple-Bar.*

ON an information charging him with having published a libel: entitled "The case of Alexander Murray, esq." before the right honourable lord chief justice LEE, at Guildhall, the sixth of July, 1752.†

Council for the king.

Sir Dudley Ryder, attor. gen.
afterwards the *famous* chief
justice of that name.

Mr. Murray, solicitor general,
now lord Mansfield, and ch.
justice of the King's Bench.

Council for the defendant.

Mr. Ford, since dead.

Mr. Pratt, now chief-justice of
the Common Pleas. There
were other counsellors on
both sides, but these were
all who spoke,

Special jury.

Richard Barwell, of Bread-
street, *foreman*.

John Horton, Old Fish-street.

Thomas Smith, Watling-
street.

Godfrey Lowe, Friday-street.

Edward Berwick, ditto.

Richard Bristow, Bread-street.

William Woolley, Cheapside.

Richard Bridgman, Aldgate
High-street.

Philip Grafton, ditto.

Samuel Lloyd, Devonshire
Square.

Henry Hall, St. Helens.

John Tuff, Bishopsgate-street.

The

* By whom German Spa Water from the Pouhon Spring, Pyrmont, and Seltzer Water, are carefully imported.

† This prosecution was founded on a vote, and instituted at the request of the House of Commons; who had voted the case of Mr. Murray to be "an impudent, malicious, scandalous, and seditious libel, falsely, and most injuriously reflecting upon, and aspersing the proceedings of this house, and tending to create misapprehensions of the same in the minds of the people, to the dishonour of this house, and in violation of the privilege thereof." An address was thereupon presented to the king, to desire his majesty would give orders to prosecute the publisher, which was accordingly done. In the information, it was called a wicked, false, scandalous, seditious, and malicious libel: and Owen was charged with having published it maliciously, wickedly, seditiously, &c. &c. The words in the pamphlet on which

The attorney-general began with a detail of the Westminster election, between lord Trentham and Sir George Vandeput. He then mentioned the House of Commons calling the rioters to account, of which Mr. Murray he said was the principal; the sentence on Mr. Murray to be given at the bar of the house; how merciful for so atrocious a crime; his commitment to Newgate; his impudent refusal to ask pardon, which was to be part of his sentence; his bad state of health in Newgate, which the house being informed of by his friends, ordered him into the custody of a messenger, which was more than he deserved; his refusal to be removed till the end of the session, when the law discharges him. "Then appeared the most scandalous and astonishing libel that ever appeared in the world. *The case of the honourable Alexander Murray, Esq. in an appeal to the people of Great Britain; more particularly, the inhabitants of the city and liberty of Westminster.* The accused now becomes the accuser. In it is stated and contained accusations of partiality, injustice, corruption, and barbarity, of the House of Commons. It accuses the House of committing a great breach in our laws; that House which is the guardian of our liberties, and the protector of our properties. It accuses also the King's Bench, with overturning that bulwark of our liberties, the Habeas Corpus Act. Every one must be shocked that reads this wicked, diabolically wicked, pamphlet. The parliament meet again and vote the pamphlet a libel: they vote it to be a false, malicious, infamous, scandalous, and seditious libel, tending to create confusion and rebellion; at least, to sow the seeds of rebellion. And to me it is astonishing, how it could enter into the mind or heart of man, to write such a libel. Now gentlemen I shall shew to you the nature of this libel, and begin in this order. 1. The Title. 2. The Introduction. 3. The state of the case, and the evidence laid before the House of Commons. 4. How considered, and in what light he has put the sentence of the Commons. 5. How wickedly and maliciously he has insinuated the thing. And 6. His treatment of the Court of King's Bench.

First. What!—shall a person appeal from the judgment of that court, who are the only judges of things belonging to them, the House of Commons, I mean. An appeal! to whom? to a mob? must justice be appealed from? to whom? to injustice? appeal to the good people of England, particularly the inhabitants of Westminster! The House of Commons

which the king's council laid their greatest emphasis, are repeated in the course of the trial: therefore it was unnecessary to print the information, which is only in the usual form, and very long.

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are the good people of England, being the representatives of the people. The rest are what—nothing—unless it be a mob. And what can be in a mob but confusion. But the clear meaning of this libel was an appeal to violence, in fact; and to stigmatize the abuse; but he durst not speak plain. Then the pamphlet tells you that his case is worthy the consideration of his fellow subjects; here he shews his virulence. He says his commitment is a precedent founded on unparalleled barbarity, striking at our laws in a most shocking manner. Then he charges the House with sinking material evidence; which in fact is accusing the House of injustice. This is a charge the most shocking, the most severe, and the most unjust and virulent, against the good, the tender House of Commons; that safeguard of our liberty, and guardian of our welfare. The next accusation the libeller brings against the House, is, on their granting Mr. Murray's removal, on the application of his physicians,—in saying—they had a mind to kill Mr. Murray, by removing him in the midst of a raging fever; and on Mr. Murray's refusing to go in that condition, the House, when his physician had mastered the distemper, ordered that none should see him. Next accusing another court that never injured any one: a court the most dignified by the worthiness of the members: the court of King's Bench (*Vide Letter on Libels, pag. 76. edit. 5.*) Gentlemen, this libel to whosoever reads it, will be found the most pungent invective that the skill of man could invent: I will not say the skill, but the wit, art, and false contrivance of man, instigated by Satan: an indirect pamphlet—though not said plain, yet understood; as being understood, is a libel: and to say that this is not a libel, is to say that there is no justice, equity, or right, in the world. There can be no court of justice if the House of Commons is not; and if the House of Commons is not to be defended, and have protection and relief at common law, yourselves, your houses, cannot have the protection of the law. *The thing you gentlemen of the jury are to go on is, whether the case doth not mean the House of Commons; for we shall prove to you the publication: then you must find the House is charged by this pamphlet to have been guilty of the most daring prostitution of power. Can there be a greater charge?*

Witnesses called.

Peter Beck swore he bought the pamphlet of William Owen, the twenty-eighth of June, 1751, at Homer's head, near Temple-bar. Sent by Ibbot to buy it, gave 1s. 6d. for two.—John Ibbot, messenger to the press, sent Peter Beck the 28th of June, to buy the pamphlet; and on the 29th, he took Owen into custody, and seized several pamphlets in his shop.

shop.—Mealin, the 27th of June, 1751, went to Owen's by order of his master, Cook, to buy them; but Owen said he had none by him, but he should have them when ready; and in the afternoon, William Owen let him have 12.—Cook, bookseller, on the 27th of June, the first time he saw the pamphlet advertised, sent his servant to buy them.—Langford and Shorter also proved Owen's selling the pamphlet.—Traven called to prove the writ for the election at Westminster.—Stanhope proved that there was an election.—Barwell, clerk of the House of Commons, proved the proceedings of the House in this affair.—The pamphlet read in court. Then the attorney-general asked Mr. Ford and Mr. Pratt, if he need trouble the court with proving more and other things; and should be glad to know what they intended for their plea and defence, in order to give the court as little trouble as possible. Mr. Ford answered, that in justice to his client, he could not tell him what they intended for their defence; but would be so far candid with him, as to say, he would take advantage of his want of proof, and therefore desired him to prove all he could.

Mr. Solicitor then got up and made a short speech to the following purport.† The question is, *whether the jury are satisfied that the defendant Owen published the pamphlet: the rest follows of course. If the FACT is proved, the LIBEL proves itself, sedition, disturbance, &c.* Therefore the printer must be affected with every thing in the pamphlet, *if the publication is proved, and that is what lies for your [the jury] determination; you being judges of the FACT, the judge determines the LAW.* But suppose you judges of the law, your own breasts may tell you this is a libel: it accuses the House of Commons of injustice; compares them to the Turkish divan, meant by the letters D—n; and the inquisition, meant by the letters I——n; and calls them a bribed assembly. Suppose a pamphlet were published after this trial, that you [the jury] were perjured and bribed, and this spread over the kingdom, would it not gall you.—These sort of libels can tend to nothing but sedition, for how can the mob or the people redress but by tumult and rebellion, and thereby subvert the constitution; for this is a part of the legislative power, and if a third part of the legislature is destroyed or exposed, how can that be without rising in the face of the constitution. There has been several papers, and paragraphs in the papers, printed on pur-

† From a word Mr. Ford dropt in asking one of the witnesses a question, Mr. solicitor guessed what would be the scope of his argument; and thereupon endeavoured anticipate him; of which Mr. Ford afterwards seems to take notice.

pose to poison the minds of the people, and seemed calculated to influence the minds of any jury that should be on this occasion : but I dare say you gentlemen, who are upon your oaths here to try the fact, and case, wholly as it is, will have no regard to such artful and false insinuations †. And I know very well the council on the other side, design to take no advantage or notice of these false and malicious hints. But as you are upon your oaths, *you judge of the FACTS we have laid before you, now in court, and ONLY them*; and like honest men bring in your verdict accordingly.

The next who spoke, was, Mr. Ford, for the defendant, as follows : “ The doctrine laid down by the gentlemen for the king, that what a court of justice does, whether legal or not, is not to be called in question, nor any remonstrance to be made against it, is a doctrine that may be full of the most fatal consequences to all sorts of men ; since every inferior court may do the same with equal justice ; for there can be no court but what is legally so : therefore if legal courts do wrong, must our mouths be shut, and not complain or petition for redress ? God forbid !—May you, gentlemen, nor I, ever be sensible of such injustice !—I say, if the case can be so.—And here the gentlemen for the king seem to endeavour to confine the council for the defendant, in their argument, by saying such and such arguments will not be used ; which is, in fact, hinting that they should not. Why ? If they have liberty to make use of any argument, thought, or fact, for the king, surely the defendant’s council ought to have the same liberty for their client. I understand not the shutting of mens mouths. Let every man clap his hand upon his heart, and examine how he would like it ; was it his own case. Shall a man be injured, or suppose he fancies himself injured, which is the same, shall his mouth be eternally closed, and no redress for the injury ever be given : nor no satisfaction to his own mind, for a right understanding, and clearing up of what he looked upon even as an injury. If things should come to this pass, which Heaven forbid ! what would be the case of us all ? We may be scourged, afflicted, and wronged, and all for the want of liberty to complain, and put forth our case : the very hand that hurts us may still continue that pressure, not knowing of the grievances done to those who lie under it ; and who, were this doctrine to be allowed, must suffer without hope of redress ; for unless our mouths are open to complaints, there can be no redress, for poor suffering mortals : for how that can be redressed which is not known ? or that known, which is not allowed to be men-

† This has reference to a letter in the London Evening Post of Saturday, May 30, 1752.

tioned?—May never you, gentlemen, nor I, be sensible of such a maxim carried into practice! Nay, the very gentlemen who put it, cannot from their hearts consent to it.—We in this case lie under disadvantages enough; our adversaries have great power; nay, their power's unknown, even to themselves, at all times; few of them know the limits of it: it may be almost what they have a mind. Though great, though wise, this house may be, yet they are but a body of men; and therefore fallible; for it is not in men, or bodies of men, to be infallible.—By this great power of the House of Commons, we, for our client, are debarred from making use of all the means of defence we could against other people. Much might be said, but much we dare not say; I own I dare not. But let me suppose, only for argument's sake, that a House of Commons may do wrong, it is not impossible for them to err; I do not say that they do in this case; former Houses of Commons certainly have erred, and those errors have been redressed by a future House of Commons, and that on a knowledge of the case by *complaint*: and if the House of Commons ever has erred, by the same rule it may err again. Therefore allow me to suppose, only for supposition and argument's sake, that the House have done wrong in their votes on this affair (not that I say they have); they have voted this pamphlet a libel, and have turned it over to the common-law, for the defendant thereby to be tried for it; then they have left the common-law to be judge of it. If so, should the defendant's council be debarred (if it was necessary, but which in my opinion is not) from contradicting, and proving this to be no libel; which would, in fact, be contradicting and opposing the opinion and vote of the House of Commons? I only put this by way of supposition; to shew, that if these arguments were necessary to be gone upon, the disadvantage we lie under. Much might be said, even on this; but much I dare not say. I know not scarce what I dare say; but I shall not go on this point, as I think it is not necessary to our present purpose; and I hope we can and shall be able to succeed without it. I only mentioned it because the gentlemen on the other side seemed desirous still further to shut the mouths of the defendant's council, who are under difficulties enough already. The House of Commons have voted this pamphlet a libel: great is the power of a vote of that House; and where is the man who dares find fault with, or contradict, the opinion of the House, especially when voted so? I dare not, and bold must be the man who dares; he knows not the risk he runs, by justifying or maintaining a book not to be a libel, when the House of Commons have voted it so. That man may perhaps have a vote against himself; for what cannot a House do, whose power is so great? What therefore I shall insist upon is this:

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The FACT charged in the information is, That the defendant, Owen, published this pamphlet, *maliciously, seditiously, scandalously, and falsely*, to the calumny of the House of Commons of Great-Britain, and in order to disturb the peace of the nation; and this he has done *wittingly, wilfully, maliciously, scandalously, &c.* This is the FACT laid to his charge; which the gentlemen have been very far from PROVING. Only proving the *sale* of the book, does not prove all those *opprobrious* and *hard* terms laid in the charge against him. If his selling and publishing this book *maliciously, with a seditious intent, scandalously and falsely, with a design* to calumniate the House of Commons, and in order to disturb the peace of the nation, is not proved, then this great *charge* in the information fails. Let the gentlemen prove those words (the *intention*) if they mean any thing by them; if they do not prove these terms, this bad intent, for in that lies the crime, then it is no more than selling printed paper, in which surely there can be no fault. Then what are these words? If the gentlemen mean any thing by them, prove them; if they mean nothing, but words of course and form, let the gentlemen scratch them out, they are needless; which if they do, their information will be very defective. But they will not consent to scratch them out I am sure; why then they must mean something by them, which if they do, consequently they must prove them. These words constitute the charge, which if they do not make out, will you, gentlemen, clap your hands upon your hearts, and say this man is *guilty*? *guilty* of what? nothing; for nothing is proved, unless selling paper is a crime. Surely gentlemen your own breasts, your own consciences, must tell you, when you consider of it, and pray consider it as your own case, fancy each of yourselves here under a rigorous prosecution, like this poor man; there is no crime proved, no malicious intent, no seditious design; therefore not proved guilty of the crime laid against him. If a man be even a bad man, and you all know it, and is accused of a crime he is innocent of, surely none will find him guilty of a crime, when that crime is not proved, because you know him to be guilty of other faults. These things are plain, even to a demonstration, to every man. But this defendant, whose cause you are now judges of, will appear to be a man of very fair character; well affected to the government and constitution in his principles; always was, and is a good subject; a member of the church of England, and as well affected to both church and state as any man in England. Therefore can any man believe, when we shall have made this appear by several witnesses of men of worth, substance, honour and credit, both clergy and laity, that he could be guilty of these things; that he *intended* this hurt laid to his charge? We shall prove
that

that he published more papers for the government, in the late rebellion, in 1745, and containing the most steadiness for government, and the most home and inveterate things against its enemies, than any printer of his time ; so that I believe, if the rebels had gained the day, his zeal might have caused his punishment. Will it then appear likely that he is guilty of these charges laid against him ? — I must observe one thing, which is the danger of your finding a verdict **SPECIALLY**.

Suppose you find him guilty of *publishing* and selling this book ; guilty includes guilt, then guilty of what ? Selling paper. — Where is the guilt ? — Take care gentlemen of being *deceived* by finding him guilty any way ; by bringing in your verdict any way against him, you render him liable of the *consequences of the whole* ; that is, to the same penalties that he would have been liable to, if he had committed the *whole crime* laid to his charge, and that charge *fully proved* against him. After you have brought in your verdict, it will be in vain for you to say you did not intend he should be punished ; you only found that he had *published*, but not committed the crime ; it will be in vain for you to petition for mercy, mercy will then be in other hands ; it will be out of your reach ; and he will be at the mercy of others, who may not look with the same eyes as you : when you have found him guilty, it will be in other breasts to punish ; it will then be too late for you to interfere. By finding him guilty, you do all that you can against him, and then it will be out of your power to serve him. You must therefore consider him *guilty* of this *great crime*, and consequently deserving of great punishment, or *not*. But if you think he is not guilty, and not deserving of great punishment, then he has not committed this great crime, then consequently they have failed in their information, and he is innocent of it ; if innocent consequently not guilty. Mr. Attorney tells you this pamphlet means, and is writ with the *intent* that is laid in the information ; he says because the pamphlet compares the parliament to I — n, it must certainly mean inquisition ; and in my opinion it may, and does as likely mean information ; and I assure you gentlemen, I have very little love for information, as well as Mr. Attorney for I — n ; it is certain that these things which will bear several interpretations, must, nor can, have no weight with you ; who should either put a good construction upon them, or none at all : you must consider too, that there is a great difference between the author and the printer ; the author knew well what he intended, and the whole sense of the pamphlet ; therefore liable to have the sense of the pamphlet interpreted against

against him; but a bookseller may sell a book and not have any intent but profit; and be quite ignorant of the contents, at least the spirit of them; therefore it is well worth considering how intent makes a crime, and how far not; every man may err, and if unintentionally he cannot be guilty of a crime before God; and if so, it would be presumption in man, to make any comparison of his own justice; what is not criminal with God, cannot be with man. *The gentlemen on the other side have not proved the intention.*

The Reverend Mr. Warner, Mr. Gossin, Mr. Hawkins, and several others were called, who proved Mr. Owen to be a good subject, a true man to the church of England, zealous for the establishment, that he had printed several papers for the government, and would not have published the pamphlet, had he known or thought the contents bad or any hurt in them, and the farthest man in England from doing such a thing.

Mr. Pratt next rose up for the defendant, and having for some time gone upon different parts of Mr. Ford's argument; (which it cannot be necessary to repeat, as Mr. Ford's speech has just been given at length, and as nearly *verbatim* as possible) he said, "Then gentlemen to shew you how necessary it is to prove the intention; if there is an indictment preferred against a man for an assault, with an intention to ravish; the intention must be proved, or else the jury cannot find him guilty. The same of an assault with an intention to kill, if the intention is not proved, he must be acquitted. If he kills, and the intention is not proved, that is, if it is not proved that he killed premeditatedly and of forethought, it is but manslaughter. Therefore in the case before us, if that part of the information is not proved that he published *maliciously* &c. you must acquit him.—The privileges of parliament are not known to the common law; perhaps they may judge and punish: I know not their privileges, nor perhaps are they to be known; may not known to themselves wholly: they may be just what they please. But they have not punished this man; they have turned him over to the common law, therefore he must be tried by the common law. Yet as hath been justly observed, they may take the thing again into consideration, and punish him in the house; and if so, he may be punished twice for the same fault, by two different sentences; which by the common law a man cannot. Mr. Attorney will not answer for the house of commons, that it will not be so. Then gentlemen consider what injustice it would be to punish a man here, who is at the same time liable to be punished there, if the house thinks fit.—Much might be said more than we dare say for our client

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